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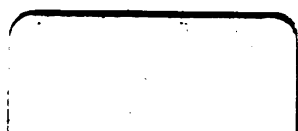
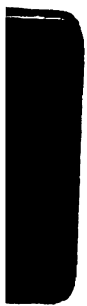
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THE

REVISED REPORTS

BEING

A REPUBLICATION OF SUCH CASES

IN THE

ENGLISH COURTS OF COMMON LAW AND EQUITY,

FROM THE YEAR 1785,

AS ARE STILL OF PRACTICAL UTILITY.

EDITED BY

SIR FREDERICK POLLOCK, BART., LL.D.,

CORPUS PROFESSOR OF JURISPRUDENCE IN THE UNIVERSITY OF OXFORD.

ASSISTED BY

R. CAMPBELL,

AND

O. A. SAUNDERS,

OF LINCOLN'S INN, ESQ.

OF THE INNER TEMPLE, ESQ.

ASSISTANT READER IN EQUITY IN THE INNS OF COURT.

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PREFACE TO VOLUME XXV.

THOSE who are curious in the early history of company law may find interesting matter in some passages of Lord ELDON's judgment in *Van Sandau v. Moore*: see at pp. 104, 109.

Lord Byron v. Dugdale, p. 282, shows us a Vice-Chancellor exercising a kind of paternal censorship in copyright cases so late as 1823. Sir JOHN LEACH tells us that in a former unreported case he refused to protect a "foolish trifling song." The principle that only wise and serious publications are entitled to the benefit of the "extraordinary remedy" by injunction has not taken root in the modern practice of our Courts.

The remarks made in *Hollis v. Goldfinch*, at pp. 368, 371, on *Stanley v. White*, 12 R. R. 544 (14 East, 332), are supplemented and perhaps superseded by those of PARKE, B. in *Jones v. Williams*, 2 M. & W. 326,

331; and of Lord BLACKBURN in *Lord Advocate v. Blantyre*, 4 App. Ca. 770, 791.

The case of the disobedient apprentice, *Winstone v. Linn*, p. 455, must be carefully distinguished from the later ones in which an apprentice's absolute refusal to be instructed (*Raymond v. Minton*, L. R. 1 Ex. 244, 35 L. J. Ex. 153), or habitual dishonesty (*Learoyd v. Brook*, '91, 1 Q. B. 431, 60 L. J. Q. B. 373), has been held to discharge the master by making it impossible for him to perform his part of the agreement, which particular acts of disobedience, however annoying, do not.

In *Hunt v. Bell*, p. 563, the Court of Common Pleas was somewhat exercised to discover the safe course between discouraging lawful pastimes already allowed and even commended by high authorities, and encouraging prize-fighting, which is a breach of the peace and unlawful. Since the decay of prize-fighting, it would seem that sparring is as legitimate a part of a public assault-at-arms as it is in fact usual, provided that it is friendly and harmless boxing, and not a colourably disguised prize-fight. See *R. v. Orton* (1878), 39 L. T. 293.

Pippin v. Sheppard, p. 746, is of some importance in the line of cases, wholly confirmed by the latest

decisions of the Court of Appeal, which maintain the ancient principle of responsibility for default in the execution of a voluntary undertaking to a person harmed by such default. That responsibility, being independent of contract, is unaffected by the existence of a contract which may give a distinct and different right of action to some other person by reason of the negligent act or default being a breach of the contract.

The reader is requested to observe that the volumes of the Law Journal now being dealt with are referred to with the addition of the Court to which the case belongs, but without that of "O. S." Practice is not uniform on this point among reporters and text-writers; we have adopted that which we find to be the more usual.

F. P.

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The Revised Reports.

VOL. XXV.

CHANCERY.

PURDEW *v.* JACKSON.†

(1 Russell, 1—71; S. C. 4 L. J. Ch. 1—10.)

A married woman whose reversionary interest in a trust fund has been assigned by her husband to a purchaser for valuable consideration is entitled to claim the fund against the assignee, if her husband dies before the interest has been reduced into possession.

[THE law upon this point is now too well settled to require any reference to authority, but there are some passages in the judgment of the MASTER OF THE ROLLS in this case which may be of use. To explain these passages it will be sufficient to state that Mrs. Bolton was entitled to a share in a sum of consols in Court, subject to the life interest therein of Isabella Purdew, and that in 1812 she and her husband assigned this reversionary interest for value to John Rose, who obtained a stop order, that Thomas Bolton (the husband) died in 1819, and his widow (Margaret) shortly after married William John Lenthall, and settled her reversionary interest on the marriage, and that Isabella Purdew (the tenant for life) died in 1822, when the trustees of Mrs. Lenthall's settlement claimed the fund.

THE MASTER OF THE ROLLS (in the course of his judgment) said:]

I shall first examine this question as if it were new, and as yet

† The collateral question, what acts by a husband amount to a reduction into possession of his wife's choses in action, is discussed in *Fleet v. Perrins* (1869) L. R. 4 Q. B. 500, 38 L. J. Q. B. 257. See also, *In re Barber* (1879) 11 Ch. D. 442.—O. A. S.

1823.
Dec. 19, 22.

1824.
Feb. 3, 5.

Rolls Court.
PLUMER,
M.R.
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untouched by authority. In that way of considering it, there are two points which deserve attention : first, what is the nature of the legal right of the husband in a personal chattel to which the wife is entitled in reversion or remainder ? Secondly, has the person, to whom for valuable consideration the husband assigns a chattel so circumstanced, the same right with his assignor, or has he a different and a better right ?

What is the universal and admitted principle of the law of England, which governs the choses in action of a married woman, and determines what is to be the effect of the marital right of the husband in them ? I shall state the doctrine as I find it laid down in Mr. Roper's Treatise on the Law of Husband and Wife : " Marriage is only a qualified gift to the husband of his wife's choses in action, viz. upon condition that he reduce them into possession during its continuance ; for, if he happen to die before his wife, without having reduced such property into possession, she, and not his personal representatives, will be entitled to it." * * What then is meant by a chose in action ? The terms " chose in action " and " reduced into possession," are legal phrases, not borrowed from a court of equity, but derived from the language and the doctrines of the common law ; and in dealing with them, it is of importance that we should confine ourselves strictly to the subject before us—a personal chattel,—and not perplex ourselves with principles applicable only to real property. The right of property in a personal chattel is inseparable from the possession ; the law of England does not know such a thing as the possession † of a personal chattel being in one man, unless by the authority of the rightful owner, while the right of property is in another. If you have not the possession, you may have an immediate right of action ; but till you recover the possession of the chattel, you have not the right of property. When it is reduced into possession, the property in it vests, and not before ; for the property in a personal chattel does not become complete, till possession is

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† This must be taken as limited to rightful possession. Trespass *de bonis asportatis*, like disseisin of corporeal hereditaments, confers a real though wrongful possession ; and on this principle the whole common law of theft is founded.—F. P.

obtained. Therefore the law of England, speaking of the different sorts of property which a married woman may have, and designating a chose in action to be a mere right of action to a personal chattel not in actual possession, holds that the husband must, as a condition without the fulfilment of which he does not acquire a right to it, reduce the thing into possession; that is, he must make the property his own, for, without possession, the property is not his; he has only a right of action, which will ultimately belong, either to himself, or to his wife, according as the one or the other may happen to survive. Now, in 1812, the property in question was, strictly speaking, a chose in action; it was not, it could not be in possession; not only was it not in possession, but there was not even a present right of action; the right of action was future, and would necessarily remain so, till the death of Isabella Purdew. The thing belonging to the wife was, therefore, a personal chattel, legally denominated a chose in action, as contradistinguished from a chattel reduced into possession.

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The next question is, what is the effect of the assignment? A great deal of fallacy has been introduced into this part of the argument from not considering *that an assignment makes no alteration in the thing transferred. When the husband has assigned the wife's chose in action, does the thing assigned continue to be a chose in action? or does it become a personal chattel in possession? If it does not continue after the transfer to be a chose in action, what makes it cease to be so? A chose in action cannot cease to be a chose in action, except by being reduced into possession; but it would be a contradiction in terms, in the very statement of the case, to say that this fund, which could not be reduced into possession till 1822, was reduced into possession in 1812. During these ten years the right to it might pass from one person to another; an assignment of it might be made in equity, which would have a certain effect; but the nature and character of the thing itself could not be changed. It is in vain to talk of Bolton's assignment as being a constructive reduction into possession. In cases where there is a present right, and an assignment of it is immediately followed by possession of the thing, the assignment, being the commence-

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ment of that immediate actual possession, may be regarded as a kind of constructive possession. But to say that the assignment of a chose in action, which is at the time incapable of being reduced into possession, is to be construed as a reduction of it into possession, is to ascribe to the assignment the effect of totally transforming the nature of the thing assigned. Up to the time of Isabella Purdew's death, the thing, which Bolton assigned, continued to be a chose in action; while it was in that state, Bolton died, without having fulfilled, without having been able to fulfil, the condition on which alone the law gives the husband the choses in action of the wife; therefore, the legal right of the wife now attaches upon it; and if a court of equity were to take it from her, equity would not follow, but would oppose the law. The wife is entitled by the law to take the chance of outliving her *husband; and it is the law which says, that, if she survives him, the choses in action which were formerly hers, shall continue to belong to her. That is the clear legal doctrine; and there is nothing in equity to modify or alter it. On this subject equity invariably follows the law. Even where a chose in action of the wife is sought to be bound by a decree in equity, if the husband dies before the thing ceases to be a chose in action, that is, before there is an order for the payment of the money, the consequence in equity is precisely the same as it is at law, under analogous circumstances; the surviving wife is entitled. Her title in such case is not a creature of this Court; it is not a mere matter of practice or regulation here; it is the wife's positive legal right, the result of a fixed rule of law.

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Where the wife has an interest in a personal chattel, by way of remainder, expectant upon the life-estate of another; in whose name, after the death of her husband, and of the tenant for life, is the action for the recovery of it to be brought? Clearly, in the name of the wife alone. It is manifest, therefore, that she has the sole legal right. Then, when she, by force, not of any equitable right, but of a legal right derived from her original title, unaffected by the marriage, has recovered at law, on what principle can a court of equity take from her the benefit of her judgment?

What equity is there to qualify her legal right, or to deprive her of it? The acts of the husband can create no such equity; for the law has said that his acts shall not affect the wife's chose in action, unless he reduce it into possession. In this view of the matter, it seems to me that I should alter a most important part of the law *of England, if I were to put it in the husband's power, where he cannot reduce the wife's choses in action into possession, to affect directly or indirectly the consequences attaching upon the wife's legal title by survivorship.

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Arguments have been adduced to prove that an assignment may be made by the husband of the wife's chose in action, while it is in expectation or remainder, and that such an assignment is valid in equity. Undoubtedly it is; and though his assignment will not prevail against the wife's right by survivorship, it does not follow that it is therefore void and without effect: it may still be, and it is (to use Lord HARDWICKE's words) "though void at law, good in equity;" it gives the assignee the chance of the husband living till the property falls into possession.

An assignee, it is said, obtains in some cases a better right than his assignor had. There may be cases of that kind; but is there any case in which the Court has interposed in favour of an assignee, though for a valuable consideration, who had notice of the actual right of the assignor and of the interest of a third person in the property, to take from that third person the legal right of which the assignee had notice? Did not Rose know, that, if Bolton died before Isabella Purdew, the property would be the wife's? and did he not accordingly covenant for the insurance of Bolton's life? He bought the property subject to the chance of what has happened. There is not a pretence for saying that he bought of the husband more than the husband possessed.

[The MASTER OF THE ROLLS concluded by saying that before finally parting with the case he would again examine and consider the subject.]

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[On this date the MASTER OF THE ROLLS, after making some further observations on the subject, said:]

Feb. 5.

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The nature and extent of the husband's interest in and power

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over the wife's choses in action is of a peculiar nature, but is defined in the clearest manner. Marriage, the law says, is only a qualified gift to the husband of the wife's choses in action, viz. upon condition that he reduce them into possession during its continuance. If he happened to die before his wife, without having reduced such property into possession, she, and not his personal representatives, will be entitled to it. The wife's right is not divested by the marriage. The chose in action continues to belong to her, unless the husband can and does reduce it into possession, and thereby makes it cease to be a chose in action. The husband has not, on the marriage, any immediate property in the chose in action; he has only the right to reduce it into possession, if it be in a state capable of being so reduced. Reduction into possession is a necessary and indispensable preliminary to the husband's having any right of property in himself, or to his being able to convey any right of property to another. If he dies without having been able or willing to perform this condition, the right of the wife continues unaltered, exactly as if she had never married. Her title is the same after her husband's death, as it was before her marriage. The husband had a power, but he had never exercised it; or the chose in action was so circumstanced, that he could not exercise it so as to fulfil the condition upon which his title depended. These are principles not contested: let us apply them to the present case, and see whether any doubt can be entertained.

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Here the wife was entitled to a chose in action, which, in the events that took place, it was not possible for the husband during his life to reduce into possession. He died, not only before the wife had acquired *any right to the possession, but before she had even any present right of action. On the death of Isabella Purdew in 1822, three years after the decease of Bolton, and not sooner, the fund became divisible into seven parts, of which one part belonged to the surviving wife. How is it possible, that in such a case the husband could either acquire or transfer to another an immediate right of possession? As to the husband himself and his executors, it is not pretended that any claim could have been set up on his or their part; he died, before he did or could perform the condition on which he was to acquire

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by the marriage any property in this chose in action; he left it a chose in action at his death, in the possession of another, who was the rightful owner during Isabella Purdew's life; he did not live long enough to have acquired any right to reduce it into possession. If the husband himself could not perform the condition on which his property in this personal chattel was to depend, how could any act of his alter the nature of the thing? How could his assignment have any such effect? The nature and operation of such an instrument is, to pass to another the right which the assignor has. The assignee may in some cases have a better and more extended right than the assignor had: but could the thing assigned be totally changed in its nature? Could he confer an absolute right to the property wholly freed from the wife's contingent right? Could the assignment of a future right of action give a present right of action? Could it give a present right of possession? Could it authorise the assignee to reduce immediately into possession what did not become due till ten years afterwards? By changing hands, could that, which was a contingent and future right of action, become an absolute and immediate right of possession? How could the assignee take the property or any part of it from Isabella Purdew during her life? In other words, how could he accelerate the *possession any more than the husband himself could have done? How could he prevent its continuing to be a mere chose in action, which was to be reduced into possession at a future period?

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* * * * *

To call this assignment a constructive reduction into possession—a possession in some sense—tantamount to possession, &c. is to suppose two things to be the same which are directly opposite to each other: it is to suppose a chose in action to be a thing constructively reduced into possession: it cannot be both: no construction can make things opposite in their nature to be the same. The phrases which are employed to gloss over this contradiction are all equally inapplicable to the subject, being borrowed from cases where there is an immediate right of possession, and where (as after a judgment, but before execution) the property may be considered changed, and the condition substan-

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tially fulfilled. Here the facts negative any such construction. Rose applied in 1812 for a restraining order to prevent possession being given to others; and he now applies for the aid of equity to give him possession. It is said that the husband substantially possessed the fund by receiving the consideration money for the assignment. But for what was that consideration paid? Certainly, *as between Bolton and Rose, the former did part with all his right; but that right was merely a contingent right to reduce the thing into possession, when Isabella Purdew died, if the husband were then alive. For this the consideration was paid and received. The deed itself shews by express recital the nature of Bolton's right and interest: in it he says in effect to Rose, "I have this as the husband of Margaret; I have no present right, no certainty of any future right; but if you choose to stand in my stead, and to purchase such right as I have, I can transfer to you a contingent right depending on the event of my surviving Isabella Purdew." The stipulation respecting the insurance of Bolton's life is decisive to shew that Bolton was a purchaser with full notice, and that he bought only a chance. The price paid was regulated accordingly, and he looked to the insurance for indemnity. If the wife's right were only equitable, Rose, being a purchaser with notice, would be bound by it. But it is not with a mere equity that he has to contend. He bought subject to the legal right of the wife, who, not being bound by the deed of assignment, would be at liberty, if the money remained a chose in action at the time of her husband's death, to assert her title to have it paid to her as her own.

After this repeated consideration of the subject, I still continue of opinion that all assignments made by the husband of the wife's outstanding personal chattel, which is not or cannot be then reduced into possession, whether the assignment be in bankruptcy, or under the insolvent acts, or to trustees for the payment of debts, or to a purchaser for valuable consideration, pass only the interest which the husband has, subject to the wife's legal right by survivorship.

WALKER v. WOODWARD.†

(1 Russell, 107—111.)

1826.
June 20.Rolls Court.
Lord
GIFFORD,
M.R.
[107]

A defendant having stated in his answer that, by carrying on business on a farm, with stock belonging to the assets of an intestate, he had made profit, but that, as he had not kept any accounts, and had blended the transactions of the farm with his other concerns, he could not set forth the amount of the profits; it was ordered, that, in taking the account against him, annual rests should be made, and interest calculated at 5 per cent. upon those annual rests.

JOSEPH WALKER died intestate in 1809, leaving a widow and four children, and property consisting principally of farming stock, and of a copyhold estate of about 200 acres, held on a lease for four lives. The widow took out administration to him, and continued in the possession of the copyhold lands, and of all his effects. In June, 1812, she intermarried with Woodward, who, in the settlement executed by him on that occasion, covenanted that he would every year, during the continuance *of his occupation of the farm, pay over to the trustees the rents and profits of two thirds of the estate and stock, to be laid out for the benefit of the children. The trustees never accepted the trust, and this covenant was never performed; though Woodward remained in the enjoyment of the farm and stock from June, 1812, to Michaelmas, 1821.

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The bill was filed by three of the children of the intestate against Woodward and his wife. It prayed that they might account for the property of the intestate of which they had possessed themselves, and that they might be charged, either with two thirds of the profits which had been made by the occupation of the farm and the use of the stock, or with two thirds of an occupation rent, and with interest at 5 per cent. on two thirds of the money value of the stock.

Woodward, by his answer, admitted, that he had carried on the farming business from June, 1812, to Michaelmas, 1821, on the copyhold, and with effects belonging to the estate of the

† This case is believed to be the earliest reported case in which a trustee employing trust money in business was charged with compound interest. See *Raphael v.*

Boehm, 8 R. R. 95, 101 (11 Ves. 92, 111); and see *Burdick v. Garrick* (1870) L. R. 5 Ch. 233, 237, 37 L. J. Ch. 369.—O. A. S.

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intestate, and that he had thereby made considerable profits ; but he said that he could not set forth an account of the profits so made, as he had not kept any books or accounts relating to the business, and had blended the transactions of the farm with his other concerns. By way of defence he alleged that he had made various payments in respect of the intestate's estate, and for the maintenance and education of the children ; and that, in October, 1821, an agreement in writing had been entered into and signed by him and his wife and by three of the children, who were then adult, and had been subsequently acceded to by the younger child after he came of age, by which they accepted a certain sum in full of all their demands *against him. Of this agreement two copies, he stated, were made and signed, one of which was given to the defendant himself, but, as he believed, had been subsequently taken from his bureau by the plaintiffs, or their mother. No evidence was given that the supposed agreement had been entered into ; but a great many witnesses had been examined by Woodward, to prove particular payments alleged to have been made by him on account of the estate of Joseph Walker, or of the children.

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Mr. Sugden and *Mr. Russell*, for the plaintiffs, objected, that this evidence could not be read or entered as read. * * *

Mr. Treslove, for the defendant. * * *

[110] THE MASTER OF THE ROLLS :

* * The only question at the original hearing is whether the defendant is an accounting party. If the course contended for by the defendant be according to the practice of the Court, it is not easy to say where the consequences will stop ; for every suit for an account against a trustee or an executor will be loaded, from the very outset, with an immense mass of evidence relating to the particulars of an account, into the consideration of which the Judge cannot enter at the hearing.

The evidence was not allowed to be entered as read.

It was then contended that Woodward was entitled to an inquiry, whether such an agreement as was alleged in his answer had been entered into: for though he had not been able to establish by evidence the fact of that agreement, yet, as it was a matter necessarily lying within the knowledge of the plaintiffs, he might, by examining them in the Master's office, make it out completely.

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*
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The MASTER OF THE ROLLS decided that the bare allegation in the answer did not entitle the defendant to *an inquiry. If circumstances compelled him to trust for evidence of the alleged fact to the discovery which he might obtain from the plaintiffs, his proper course would have been to have filed a cross bill. [*111]

The plaintiffs having elected to waive the account of profits, it was held, that they were entitled to charge the defendant, Woodward, with an occupation rent of the farm, and with interest at 5 per cent. on the money value of the stock.

Then the only question was whether, in taking that account, annual rests should be made, and interest calculated at 5 per cent. upon those annual rests.

The MASTER OF THE ROLLS was of opinion that the admissions in Woodward's answer entitled the plaintiffs to annual rests, and 5 per cent. interest upon those rests.

EMERY v. HILL.†

(1 Russell, 112—117.)

A testator directed his executors to invest a sum of money in 3 per cent. stock, and bequeathed the stock to the treasurer of a charitable corporation in Scotland, in order that the dividends might be applied to the purposes of the charity. The Court ordered the stock to be transferred to the corporation.

1826.
Feb. 14.

Rolls Court.
Lord
GIFFORD,
M.R.
[112]

THE will of Peter Hugetan Van Vryhouver, bearing date on the 16th of September, 1789, contained the following bequest:

† *In re Lea* (1887) 34 Ch. D. 528, 56 L. J. Ch. 671.

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v.
HILL.

“Also I give and bequeath to my executors in England 20,000*l.* sterling in trust, to invest the same in the capital stock of 3 per cent. Reduced Annuities at the Bank of England, which said stock I do hereby give and bequeath to the treasurer for the time being of a Society in Scotland for Propagating Christian Knowledge, to apply the interest or dividends thereof from time to time in equal portions, to and for the uses and purposes of the first and second patent. And I will and order, that no part of the said legacy be at any time laid out or employed for the purpose of building, or in repairs or ornaments, but that the same be wholly and solely applied for the charitable and pious uses and purposes of the said society.”

The Society in Scotland for Propagating Christian Knowledge was incorporated under that name by letters patent, first of Queen Anne, and afterwards of George the Second.

A suit having been instituted for the administration of the testator's assets, the Court, by the decree dated the 6th of March, 1792, ordered, “that the legacy should be paid and transferred by the executors for the use of the charity, and the treasurer of the charity was to declare the trusts thereof accordingly.” In 1795 the Accountant-General certified, that he had laid out the
[*113] legacy of 20,000*l.* in the purchase of 28,844*l.* 15*s.* 4*d.* *Bank 3 per cent. Annuities, which had been transferred to his account, and accepted by him in trust in the cause, to the account of the treasurer of the Society in Scotland for Propagating Christian Knowledge. The dividends of that stock had ever since been paid to the treasurer for the time being of the society.

The society and their treasurer now petitioned, that the 28,844*l.* 15*s.* 4*d.* Bank 3 per cent. Reduced Annuities might be transferred to the society or their treasurer for the use of the charity.

Mr. Shadwell, for the petition [cited *The Provost, Baillies, &c. of Edinburgh v. Aubery*; † *The Attorney-General v. Lepine*; ‡ and an unreported case of *Martin v. Paxton*, before the Lord Chancellor, on the 24th of February, 1824.]

† Amb. 236.

‡ 19 R. R. 55 (2 Swanst. 181).

Mr. Jacob, on the same side with *Mr. Shadwell*.

EMERY
v.
HILL.
[116]

THE MASTER OF THE ROLLS :

In the case of *Martin v. Paxton*, there was at first some uncertainty whether the mayor, &c. of Lyons were the proper persons to receive the money : but, when that doubt was removed, the LORD CHANCELLOR made the order. Here the difficulty, which existed there, does not arise : for if the fund is to be parted with, it is clear that the petitioners are the persons entitled to have possession *of it. Upon the authorities which have been cited, the order may be made for the transfer of the stock to the society, and for the payment of the dividends, if there are any now in Court, to the treasurer.

[*117]

The petition had not been served on the Attorney-General, or any other party in the cause.

HAY v. FAIRLIE.

(1 Russell, 117—129 ; 4 L. J. Ch. 112.)

[AN instance of the application of the principle explained in *Logan v. Fairlie* (*post*, p. 208) to another legacy under the same will.—O. A. S.]

1826.
Feb. 14.
Rolls Court.
Lord
GIFFORD,
M.R.
[117]

REYNOLDS v. TORIN.

(1 Russell, 129—135.)

A testator bequeathed to his wife during her life four sevenths of the income of his general residuary estate, in which he intended to include a Scotch heritable bond ; but the infant heir, having elected, under the order of the Court, to claim against the will, took that bond by his legal title, subject to the widow's right of terce : Held, that the widow must elect, and that, although disappointed of the four sevenths of the interest of the bond debt, which the testator meant her to enjoy, she must, if she claimed what he had effectually bequeathed to her, bring in her terce to increase the general residuary estate.

1826.
Feb. 15.
Rolls Court.
Lord
GIFFORD,
M.R.
[129]

GENERAL REYNOLDS, by his will, dated the 17th of June, 1819, after bequeathing to his wife a house, and a sum of money,

REYNOLDS
v.
TORIN.

together with a few specific articles, and giving legacies to several other persons, directed his executors to divide the produce of his estate, "as per schedule annexed," into two funds,—the one consisting of four sevenths of the whole of his property,—the other, of the remaining three sevenths,—and to pay the interest of the four sevenths, commencing from one twelvemonth after his decease, to his wife during her life, for the maintenance of herself and her children, without account or control. The other three sevenths were given to his children, as also the reversionary interest in the four sevenths, expectant on the wife's death, in certain shares, and subject to certain provisos. The testator died shortly afterwards, leaving his wife and four children him surviving. Annexed to the will was a schedule of the testator's property in his *own handwriting, in which he stated the amount of the whole at 59,450*l*. The first item in this schedule was, "In the hand of George Simson, Esq. of Selwood Park, 26,000*l*." This was a debt due from Mr. Simson, secured by an heritable bond in the Scotch form, and charging lands in Scotland, and, therefore, according to the Scotch law, did not pass by the will. A declaration to that effect was made by the decree on further directions; and as the heir-at-law was an infant, it was referred to the Master to inquire whether it would be for his benefit to take under the will, or to renounce the benefits given him by the will, and to claim, as heir-at-law, the heritable bond. The Master reported, that it would be for the benefit of the infant to take as heir.

[*130]

[*131]

The widow, by the law of Scotland, was entitled to her terce in the bond; that is, to a life-interest in the *third part of the sum secured by it; and the question was, whether she could claim both her terce and the benefits given her by the will, or whether she was bound to elect between them, and, if she took under the will, to bring in her terce to increase the residue for the benefit of the younger children.

Mr. Pepys for the younger children. * * *

[132]

Mr. Heald and *Mr. Tennant* for the widow [cited *Miall v. Brain*,† and other cases]:

† 20 R. B. 277 (4 Madd. 119, 125).

It would have been reasonable enough to have put her to elect between her legal rights and all the benefits intended for her by the testator ; but the election, which she is now called upon to make, is between her legal rights, and only one half of the benefits which the will purports to bestow on her. * * *

REYNOLDS
v.
TOBIN.
[133]

THE MASTER OF THE ROLLS :

To exclude the widow from her legal right, either there must be an express declaration to that effect, or it must appear clearly from the whole frame of the will, that it was the testator's intention to give her some interest wholly inconsistent with her enjoyment of that legal right. Here the testator has given her the interest of four sevenths of the produce of his whole property, meaning to include in his bequest the interest of four sevenths of this 26,000*l.* He could not intend to give her both four sevenths and one third of the yearly interest of the bond ; his purpose must have been to exclude her legal right. The widow, therefore, must be put to her election ; and if she elects to take under the will, the amount of her terce must be applied to the benefit of the younger children.

* * * * *

1826.
Feb. 17.

HOCKLEY v. BANTOCK.

(1 Russell, 141—145.)

Rolls Court.

Lord
GIFFORD,
M.R.

[141]

Trustees and executors under the will of a testator, who had directed them to invest a share of his residuary estate either in the public funds or on mortgage at 5 per cent., admitted by their answer that they had, from time to time, balances in their hands, and it was proved that, many years after the death of the testator, they had not invested the share either in the funds or on mortgage; inquiries were directed at the original hearing concerning the balances retained by them, and the prices of 3 per cent. stock at the several times when such balances were in their hands.

Executors, who are also trustees, agree to give one of the residuary legatees, as a security for his share, a legal mortgage of real estate, part of the testator's assets, and, for the purpose of having the mortgage prepared, they deliver the title-deeds to the legatee's agents: this gives him an equitable lien on the property, as against the executors, though not as against the other residuary legatees.

HUGH BANTOCK bequeathed a share of his residuary estate to Mrs. Hockley during her life, with remainder to her children; and he directed the executors and trustees of his will either to invest this share in the public funds, or to lay it out on mortgage at 5 per cent. interest. He died in 1812.

The bill was filed by Mr. and Mrs. Hockley, and their infant children, against the executors and the other residuary legatees. It made a special case of breach of trust against the executors; charging them with having retained balances which ought to have been applied in satisfaction of the bequest to Mrs. Hockley, and with having omitted either to invest those balances in the funds or to lay them out on mortgage.

The executors insisted, that Mrs. Hockley had received more than the amount of the yearly interest of her proportion of the residue; but they admitted, that they had from time to time kept balances in their hands; and it was proved, that, so late as 1822, they had not made any investment on account of that lady and her children, though they had, in 1814, laid out 400*l.* in the purchase of stock for another residuary legatee, whose share was equal only to one-half of that which the plaintiffs were entitled to receive.

Under these circumstances,

HOCKLEY
v.
BANTOCK.
[142]

The MASTER OF THE ROLLS was of opinion that the plaintiffs had a right, not merely to the common decree for an account, but also to an inquiry what balances had been from time to time in the hands of the executors.

The plaintiffs insisted further, that an inquiry ought to be directed as to what were the prices of 3 per cent. stock at the respective times when any balances should be found to have been in the hands of those defendants.

Mr. Heald and Mr. Randall, for the executors :

The sole object of such an inquiry would be, to charge the executors in respect of the difference which may have taken place in the price of the 3 per cents. The Court, however, has no authority so to charge them ; for they were not bound to invest any portion of the residue in the public funds, and they cannot be held answerable in a court of equity for not doing that which it was lawful for them to omit. The will of the testator left it expressly to their discretion to lay out the money either in the purchase of stock or on mortgage at 5 per cent. How, then, can the cestuis que trust, or the Court on their behalf, say, " We shall hold you answerable for not investing in the 3 per cents. the balances, which it was competent for you to have lent out on real security ? " Therefore, the inquiry which is prayed ought not to be directed in this stage of the cause.

Mr. Pemberton, and Mr. Patteson, for the plaintiffs :

Though the executors had an option to invest the money either in the funds or on mortgage, yet, as they did neither of the two things, either of which they might *with propriety have done, and one or other of which it was their duty to do, the cestuis que trust have now a right to say, " You have committed a breach of trust ; and for that breach of trust you shall be answerable, not in the way which may be most convenient for you, but upon the principle which shall be most beneficial to us." Such is the universal rule applicable to every case of

[*143]

HOCKLEY
v.
BANTOCK.

breach of trust. Where a trustee employs the trust monies in business, he may be made to account, not merely for interest at 5 per cent., but for the profits of the trade, though it could in no case have been his duty to invest the fund so as to produce more than legal interest. Not having lent out the money on mortgage, these defendants had no other alternative except that of purchasing stock. Stock, however, has not been purchased; and the plaintiffs will hereafter have a right, if they think proper, to call upon the Court to compel the executors to place them in the same situation as if stock had been bought. Upon that claim, when advanced, the Court will decide: but, in the mean time, the cestuis que trust have a right to this inquiry, for the purpose of ascertaining and placing on the record those circumstances by which they must be guided in determining on which of two principles they shall endeavour to bring those defaulting trustees to an account.

THE MASTER OF THE ROLLS

At first expressed a doubt whether he ought to direct an inquiry concerning the prices of stock, where the executors, who had retained the balances in their hands, had the alternative expressly given them by the will, of investing the assets either on Government securities or on mortgage. Finally, however, he decided that the plaintiffs were entitled to the inquiry.

[144]

The executors had taken a conveyance of a freehold house in part discharge of a debt due to the testator; and, upon being urged to invest the plaintiffs' share, they had proposed to give a security for it, to the extent of 800*l.*, by a mortgage of those premises. This proposal was accepted; and the title-deeds of the house were delivered to Mrs. Hockley's agents, in order that a mortgage-deed might be prepared. The executors, however, subsequently receded from their agreement, on the ground that they had no right to mortgage a part of their testator's assets; and the intended mortgage had never been executed. The plaintiffs now insisted, that, as between them and the executors, they had an equitable lien on the house for their share of the residue, to the extent of 800*l.*

Mr. Pemberton in support of the lien [relied on *Edge v. Worthington*,† which was not in print when *Norris v. Wilkinson*; was decided.] HOCKLEY
v.
BANTOCK.

Mr. Heald insisted that, inasmuch as the house was part of the testator's assets, the executors could not give a mortgage upon it either in law or in equity. [145]

THE MASTER OF THE ROLLS :

It is proved that the executors agreed to give the plaintiffs a legal mortgage on the house for the sum of 800*l.*, and that the title-deeds have been delivered to the plaintiffs or their agents for the purpose of having that agreement carried into effect. The agreement and the delivery of the deeds constitute a mortgage in equity as against the executors, though not so as to bind the interests of the other residuary legatees : and the plaintiffs are entitled to a declaration, that, as against the executors, they have an equitable lien on this house for the sum which shall be found due to them, to the extent of 800*l.*

SUTTON *v.* SHARP.§

(1 Russell, 146—152.)

An executor, being a trader, who, after paying pecuniary legacies in due time, retains for many years balances belonging to the residue, and mixes them with his own monies, will be charged with interest at 5*l.* per cent., though it could not be ascertained, without a decree of the Court, who were the persons entitled to the fund.

1826.
Feb. 16, 17.
Rolls Court.
Lord
GIFFORD,
M.R.
[146]

[THE MASTER OF THE ROLLS in his judgment in this case said:]

I consider it as established doctrine, that a party, who, being a trader, and having, of course, an account with a banker, places trust monies at his *banker's in his own name, by that means increasing the balances in his favour, acquiring additional credit, and enjoying in his business the advantages naturally [151]
[*152]

† 1 R. R. 20 (1 Cox, 211).

‡ 12 Ves. 192 [overruled].

§ As to the rate of interest allowed

or charged by the Court, see now
Re Goodenough, '95, 2 Ch. 537.—F. P.

SUTTON
v.
SHARP.

arising from that circumstance, must be considered as having employed the money for his own benefit. This executor is admitted at the Bar to have been a trader; he acknowledges that he mixed the trust monies with his own: it necessarily follows that he must be charged with interest at 5 per cent.

* 1826.
Feb. 20.

HARMER v. HARRIS.†

(1 Russell, 155—158.)

Rolls Court.

Lord
GIFFORD,
M.R.

[155]

In a suit for the administration of assets, a debtor to the estate, who is entitled to have his costs of suit out of the fund, will not be allowed to receive payment of them while his debt continues unsatisfied; but the costs due to him will be set off *pro tanto* against the debt due from him.

Where the same solicitor acts for an executor and other co-defendants, the estate will be charged, in respect of the executor's costs, only with that proportion of the sum due to the solicitor from his clients, which the executor, as between himself and the co-defendants, ought to bear.

THIS was a suit for the administration of a testator's assets, in which, according to the common course, all the parties were entitled to have their costs out of the fund. But the plaintiffs were reported by the Master to have been indebted to the testator in a sum which they had not yet paid; and as they were not in solvent circumstances, the question arose at the hearing on further directions, whether they should receive their costs out of the estate, or should only retain them out of the debt which they owed to it.

Some of the defendants were in a similar situation.

Mr. Sugden for the plaintiffs. * * *

[156]

Mr. West, contra. * * *

[157]

Mr. Rose, Mr. Cooper, and Mr. Moore, for other parties.

THE MASTER OF THE ROLLS:

The plaintiffs are indebted to this testator's estate in upwards of 170*l.*; and they ask, before they have paid in that sum, that they may receive the costs, to which they are entitled, out of the

† *Smith v. Dale* (1881) 18 Ch. D. 516, 50 L. J. Ch. 352.

fund in Court. If I were to grant this demand, I should be going far beyond what any decided case authorizes me to do. These parties cannot receive their costs, while they continue debtors to the estate. The lien of the solicitor does not alter the question. Solicitors, when they undertake the prosecution of causes, look, or ought to look, for reimbursement to the personal responsibility of their clients, as well as to the fund which is to be administered in the suit.

HARMER
v.
HARRIS.

It afterwards appeared, that the same solicitor had acted in the suit for several defendants, of whom one was an executor, entitled to be paid his costs, and the others were debtors to the estate: and a question arose, whether, under the description of "costs of the executor," the solicitor would have a right to receive out of the fund the whole amount of charges which had been incurred for the executor jointly along with some of the co-defendants, in the same manner as if he had appeared for the executor alone.

[*158]

THE MASTER OF THE ROLLS :

Much of the costs may have been incurred for these defendants jointly; the expense, for instance, of office copies taken for their common use. The costs of the executor are only that proportion of the costs due to the solicitor, with which the latter, as between the co-defendants for whom he acted, could have charged the executor.

OSBALDESTON v. ASKEW.

(1 Russell, 160—164.)

1826.
March 1.

On a reference of title in a suit by a vendor for the specific performance of a contract for the purchase of lands, the mere fact that a suit has been subsequently instituted and is pending, in which part of the lands are claimed adversely to the vendor, is not a sufficient ground for reporting that a good title cannot be made.

Lincoln's Inn
Hall.
Lord
ELDON, L.C.
[160]

THE [plaintiffs] instituted this suit against Askew, for the specific performance of a contract, by which he had agreed to purchase a certain estate, consisting of about seventy-six acres;

OSSALDES-
TON
c.
ASKEW.

nine acres of which were [claimed by Mr. and Mrs. Gait under an adverse title].

The bill was filed in 1813. In 1818 a decree was pronounced, referring it to the Master to inquire, whether a good title could be made to the premises; and if it could, when it first appeared that a good title could be made. * * *

By a report bearing date on the 29th of June, 1824, the Master stated, that, “upon perusal of an abstract of title to the premises, which had been laid before him on behalf of the plaintiffs, and it being alleged by the solicitor for the defendant, and admitted by the solicitor for the plaintiffs, that a suit had been instituted against them by the heir-at-law of Mary White,† late wife of Joseph White, respectively named in the abstract of title, and was then pending in this Court, for the recovery of the lands purchased of Joseph White, as in the abstract mentioned; and the same being part of the premises in *question in the cause,—he was of opinion that a good title could not be made to those premises.”

[*161]

To this report four exceptions were taken. The first exception insisted, that the Master ought to have certified that a good title could be made; the third, that he ought to have certified that the suit of Mr. and Mrs. Gait was continued and prosecuted at the instance of, and in collusion with the defendant Askew; and the second and fourth, that he ought to have certified that the suit of David Gait and Mary his wife related only to about nine acres of land, which were not necessary to the convenient occupation of the residue of the premises, and that he ought to have taken notice of an affidavit produced before him to establish that fact.

Mr. Horne and Mr. Sidebottom, for the exceptions.

Mr. Sugden and Mr. Roupell, *contra*.

THE LORD CHANCELLOR :

What the Master has here stated, as his ground for objecting to the whole title, is not of such a kind, that the Court can pro-

† Mrs. Gait was the only child of Mary White, and she and her husband instituted the suit here referred to in November, 1819.—O. A. S.

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TON
v.
ASKEW.

ceed upon it without further inquiry. If, in a suit for the specific performance of a contract for the purchase of lands, the mere fact of the pendency of another suit, instituted during the progress of the original suit, and relating to some part of the property contracted to be sold, is to be a sufficient reason for stating that a good title cannot be made, I know not how a vendor can hope ever to get to a final decree.

In the present case the objection to the title is, that a suit is pending, in which a Mr. and Mrs. Gait set up a claim to about nine acres, part of the seventy-six acres which are the subject of the contract in question: and *the Master has said, “inasmuch as that suit is depending, be it worth much or be it worth little, be it complicated or be it simple, be the claim advanced in it well founded or not,—I am authorised in stating, that a title to the premises cannot be made.”

[*162]

From the accidental circumstance of my having heard the appeal upon the validity of the plea which was put in to the bill of Mr. and Mrs. Gait, it happens that I am acquainted with the circumstances and nature of their claim. The present vendor derives his title to the nine acres, on which the difficulty arises, from Joseph White; and the objection made by the bill of Mr. and Mrs. Gait is, that these nine acres were the estate, not of Joseph White, but of his wife; that her right was never barred by fine; and that it descended from her to Mrs. Gait, her heir-at-law. And, undoubtedly, if the conveyance from Mrs. White were made merely by lease and release, or by any other instrument, not being an assurance of record, or if a fine were levied, but the uses of it were not declared so as to take the property out of her, the title would still be in her and her heirs. But the abstract of title, which has been carried in before the Master, must state a purchase of some kind or other by that Joseph White; and if it appears that the purchase, by which he acquired the estate, was a purchase made by a fine which the wife levied, and of which the uses were properly declared, is there not a complete answer to the objection? Now, in what a situation would the suitor be, if it were to turn out that there is, in the proceedings on the inquiry into title in the Master's office, a direct answer (and an answer, too, which cannot be affected by

OSBALDES-
TON
v.
ASKEW.

[*163]

any mistake) to the demand set up in that suit, the pendency of which is supposed by this report to be a decisive objection, rendering all further inquiry superfluous. Because a demand *is made in one proceeding in the Court, shall the mere fact of the existence of such a demand, though in another proceeding of the same Court there is or may be a satisfactory answer to it, deprive a vendor of his equitable right to enforce the performance of a contract of sale?

In this case, the Court runs no risk. The objection is, that a suit is pending, in which part of the property is claimed by the heir-at-law of a married woman, whose estate it formerly was: the answer is, that the married woman conveyed, by fine duly levied, to the persons under whom the vendor derives his title. On such a point the Court and the Master cannot come to a different conclusion.

The right course for the Master to have pursued, would have been, to have stated, "that it had been alleged and admitted before him that there was a suit depending relative to part of the premises, which proceeded upon this ground that the vendors could not make a title to themselves under Joseph White, because the lands had been the inheritance of Joseph White's wife, whose estate had never been taken out of her by a fine duly levied; that, nevertheless, it appeared before him, upon an accurate examination of what was stated in the abstract and of the record of the fine mentioned in it, that there was, by the duly levying of that fine, a complete answer to the demand raised in the pending suit; but that he submitted the matters to the Court."

With respect to the first exception, the Master must review his report.

[*164]

The other exceptions must be overruled; for they relate to matters of which the decree did not authorize the Master to take cognizance. It was not referred to *the Master to certify whether the nine acres were material to the convenient occupation of the rest of the estate; neither had he any jurisdiction to consider what equities, independently of the question of title, might arise out of the conduct of the parties. Suppose it were clear that Askew had procured Mr. and Mrs. Gait to prosecute

their suit, for the purpose of baffling the vendors who were seeking to enforce against him his contract of purchase, what could the Master, on a reference of title, have to do with such a circumstance? His business was to consider, whether the objections to the title were good—not at whose instance, or from what motives, they were set up. What opinion the Court might entertain, or what course it might adopt, if it saw that the suit, which created the difficulty, was in fact prosecuted by the party who was resisting the fulfilment of his agreement, is quite another question.

OSBALDES-
TON
v.
ASKEW.

MONTAGU v. NUCELLA.†

(1 Russell, 165—173.)

1826.
Jan. 26.
Aug. 9.

Rolls Court,
Lord
GIFFORD,
M.R.
[165]

A testator bequeaths a sum of stock to each of five nephews and nieces, or to their respective child or children; should any die without child, such share to revert to the residuary legatee. Each of the nephews and nieces who survive the testator, takes his or her legacy of stock absolutely.

The same testator appoints as his residuary legatee E. P. M., his child or children; in case of his death without any such, the residuary interest to vest in the other five nephews and nieces then alive, share and share alike, and, as before, to each of their respective child and children; and in case of either of their deaths without any such issue, then his or her share to be divided amongst the survivors:—E. P. M., having survived the testator, takes the residue absolutely.

EDWARD VAN HARTHALS, by his last will, dated in August, 1814, after naming Edward Proudfoot Montagu, son of his deceased half-brother Gerard Montagu, one of his executors, [and bequeathing 15,000*l.* to him] made, among other bequests, the following :

* * “ I leave and bequeath 10,000*l.* capital in the *Consolidated 3 per cent. Annuities to each of my nephews and nieces, sons and daughters of my half-brother herebefore mentioned, or to their respective child or children, † viz. George Montagu, Edgar Montagu, Magdalena Montagu, Louisa Montagu, and Mary Anne Montagu : and if at my death there shall not be a sufficient sum in my name for these and the forementioned 15,000*l.* of same stock to my

[*166]

† Followed in *Whitcher v. Penley* (1846) 9 Beav. 477. tive child or children,” were an interlineation in the will.

† The words, “ or to their respec-

MONTAGU
v.
NUCELLA.

nephew Edward Proudfoot Montagu, my executors are forthwith to purchase what [is] wanting, that these transfers may be made as soon as conveniently can be done: should any die without child, such share to revert to my residuary legatee." * * *

Edward Proudfoot Montagu, and the other five nephews and nieces named in the will, survived the testator. The bill was filed by Edward Proudfoot Montagu, against the executors, his own children, the five other nephews and nieces of the testator, and their children.

* * * * *

[167] The five nephews and nieces claimed their respective legacies of 10,000*l.* stock absolutely; and against this claim it was insisted, that they took only life interests, with remainders to their children respectively.

* * * * *

Mr. Sugden and *Mr. Stephenson*, for the plaintiff. * * *

[168] *Mr. Shadwell* and *Mr. Merivale*, for the five nephews and nieces. * * *

Mr. Skirrow for the children of Edward Proudfoot Montagu, and of one of the other nephews. * * *

[169] *Mr. Pemberton*, for the executors.

[In the present state of the law it is unnecessary to refer to the numerous cases cited by counsel.]

Aug. 9.

THE MASTER OF THE ROLLS [after referring to some of the cases which had been cited, said:]

[171] Here the bequest is "to nephews and nieces, or to their respective child or children;" and a direction is added, that the transfer should be made, that is, to those who were to take under the will, as soon as could conveniently be done. The true construction is, to vest the legacies absolutely in the nephews and nieces who survived the testator, and that the child or children of nephews or nieces took only as substitutes for their parent or parents dying in the testator's lifetime.

* * * * *

BULL *v.* PRITCHARD.†

(1 Russell, 213—219.)

A testator bequeathed personal property to his trustees and executors, upon trust, to pay the dividends to his daughter, during her life, to her separate use, and, after her decease, to pay the principal unto all and every her children who should live to attain twenty-three years of age, share and share alike, with benefit of survivorship, in case any of them died under that age; with limitations over, in case there should be no such child or children, or, being such, all of them should die under twenty-three, without lawful issue. The daughter had a child, who died under age in the daughter's life-time. The bequests to the children, and the subsequent limitations, were too remote.

THOMAS EVANS, by his will, dated the 29th of May, 1809, devised all his freehold estates to John Millsom, Samuel Pritchard, and John Gumbrell, and to the survivors and survivor of them, and the heirs and assigns of such survivor, upon trust, to pay the rents and profits to his daughter Mary Bull, during her life for her separate use; "and, from and after the decease of my said daughter, then I do hereby order, direct, limit, and appoint, that my said trustees or the survivor of them, or the heirs or assigns of such survivor do, by good and sufficient conveyance and assurance in the law, convey and assure my freehold estates unto, and equally between and among all and every the child and children of my said daughter Mary Bull, who shall live to attain the age of twenty-three years, and to his, her, and their heirs and assigns for ever as tenants in common, and not as joint tenants; and if there shall be but one such child, then to such only child, his or her heirs or assigns for ever: and in case there shall be no such child or children, or, being such, all of them shall die under the said age of twenty-three years, without lawful issue, then upon trust, that my said trustees or the survivors or survivor of them, or the heirs or assigns of such survivor, do, by such like good and sufficient conveyance and assurance in the law, convey and assure my said freehold estates unto, and equally between and amongst all and every my brother and sisters, namely, John Evans, Mary Spendlove, Elizabeth, the wife of John William Nevett, and Martha, the wife of the said John Millsom, and to his, her, *and their

1825.

Nov. 22.

1826.

July 11.

*Rolls Court.*Lord
GIFFORD,
M.R.

[213]

[*214]

† *Abbas v. Burney* (1880) 17 Ch. D. 211, 50 L. J. Ch. 248.

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respective heirs and assigns for ever, as tenants in common." Then, after bequeathing a leasehold specifically, the testator gave all the residue of his estate and effects to his executors, upon trust, to invest it in the public funds, and pay the dividends to his daughter, Mary Bull, during her life, for her separate use, "and from and after the decease of my said daughter, upon this further trust, to pay, assign or transfer all and singular the rest, residue and remainder of my said estate and effects, or the stock or funds in which the same shall or may have been laid out, unto and equally between and amongst all and every the child and children of my said daughter lawfully begotten, or to be begotten, who shall live to attain the age of twenty-three years, share and share alike, with benefit of survivorship, in case of the death of any or either of them under the age of twenty-three years, as tenants in common, and not as joint tenants: and in case there shall be but one child, then upon trust to pay, assign or transfer the same unto such only child, his or her executors and administrators; and in case there shall be no such child or children, or, being such, all of them shall die under the age of twenty-three years, without lawful issue, then upon trust to pay, assign, or transfer the same unto and equally between and amongst my said brother, John Evans, and my three sisters, Mary Spendlove, Elizabeth, the wife of John William Nevett, and Martha, the wife of the said John Millsom, share and share alike, as tenants in common." The three trustees were also appointed executors, "with power to lay out and apply the interest of such child's respective share, or so much thereof as they might deem necessary towards their maintenance, education, and bringing-up, notwithstanding such child's share should not be then absolutely vested."

[215] The testator died in January, 1817. Mrs. Bull, who [died in 1838]† was his only child, had at that time one daughter, who was then about fifteen years of age, and died in November, 1820, without issue. Mrs. Bull had no other children. A considerable part of the testator's property consisted of leaseholds for years.

The bill was filed by Mr. and Mrs. Bull, against the surviving executor, and the persons who claimed under the ultimate bequests and devises; praying, that the limitations and trusts,

† See 5 Hare, 568.

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created and declared by the will concerning the freeholds, leaseholds, and residuary personal estate of the testator, might be declared to be void for remoteness.

It was objected, that the plaintiffs, even if right in their claim, were premature in calling for such a declaration, while Mrs. Bull's life estate continued. The answer to this was, that, if the limitations were valid, it would be the duty of the executor to convert the leaseholds into money, in order that the tenant for life and those in remainder might enjoy the property according to their several rights; and that it was therefore necessary to decide the question now, in order that the parties might know, in what manner the leaseholds were to be dealt with at present.

Mr. Shadwell and Mr. Lovat for the plaintiffs :

The first bequest, after the gift of a life interest to Mrs. Bull, is, to all her children who shall attain twenty-three years of age. Nothing vests in them till they attain that age; and, as that event might not happen till more than twenty-one years after a life in being, the gift to the class is too remote. No distinction can be made in favour of the child who was in existence at *the testator's death, nor of the children who may attain the age of twenty-three, during Mrs. Bull's life, or within twenty-one years afterwards. For the bequest is a general bequest to a class; the rule of law prevents it from operating in favour of the whole class; and the Court cannot split it into bequests to individuals, or to some of the class: *Leake v. Robinson*.† The gift fails *in toto*.

[*216]

The limitation in favour of the testator's brother and sisters, is only "in case there shall be no such child or children, or being such, all of them shall die under twenty-three." Such child or children cannot mean children attaining twenty-three; for, from the words immediately following, it is evident, that children dying under twenty-three are included under the description, "such child or children." That phrase must denote "children of Mrs. Bull," absolutely; and therefore, as she had a child, the first branch of the alternative can never happen. The other event is, "in case all such children shall die without issue, under

† 16 B. R. 168, 181 (2 Mer. 363, 388).

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twenty-three;" and as that is an event which might not happen till more than twenty-one years after a life in being, the limitations, which depend upon it, are too remote. Mrs. Bull, therefore, as sole next-of-kin to her father, is entitled to the absolute interest in the leaseholds, expectant upon the life estate given to her separate use.

Mr. Sugden and Mr. Koe for the executor :

[*217]

The Court will struggle to bring this bequest within the rules of law; and there is nothing in the language of the will which forces us to postpone the vesting of the interests of the children till the age of twenty-three. *The interests were meant to vest in them immediately, subject to be divested, in the event of their dying under twenty-three: *Farmer v. Francis*.† If nothing was to vest till they attained twenty-three, what is the use of the words, "with benefit of survivorship, in case of the death of any or either of them under the said age?"

* * * * *

The ultimate limitation over refers to the period of the termination of the prior life estate, that is, to Mrs. Bull's death: and it provides for two events: the first, that of there being then no child or children of Mrs. Bull; the second, that of there being children, and all those children dying subsequently without issue, before they attain twenty-three. The latter would exceed the limits allowed by law; but the former is within those limits, and may yet happen; in which case, the limitation over will take effect.

Mr. Horne, Mr. Pemberton, and Mr. Hayter, for other parties.

1826.
July 11.

THE MASTER OF THE ROLLS:

[*218]

It would be premature to decide on the rights of the parties under this will in the freehold estates; † but, being *pressed for a decision concerning the leaseholds, I must determine the

† 2 Bing. 151.

raised and decided. See 5 Hare, 567.

‡ This question was subsequently —O. A. S.

question which arises upon the words, so far as they affect that species of property.

BULL
F.
PRITCHARD.

It is clear, that those children alone of the daughter were to take who attained the age of twenty-three years. The attainment of that age was necessary to vest an interest in any of them; and all who attained that age were to take. Consequently, the vesting of the interests might not take place till more than twenty-one years after a life in being. The Court cannot distinguish between the children born in the lifetime of the testator, and those who were or might be born afterwards; and therefore the limitations over are too remote. That doctrine is established in *Leake v. Robinson*,† and *Jee v. Audley*.‡

This case was, in the argument, compared to that of *Farmer v. Francis*.§ There a testator devised the residue of his estate to trustees upon trusts for his wife during her life, and then for his daughter during her life; and “after the decease of his wife and daughter, upon trust for all and every the children of his daughter, as should be living at the time of the decease of the survivor of his wife and daughter, equally amongst them to be divided share and share alike, when, and as they should respectively attain the age of twenty-four years;” with a limitation over, in case there should be no such issue or child of his daughter living at the decease of the survivor of his wife and daughter, or, being such, all should die without lawful issue, under the age of twenty-four years: and it was held by the Common Pleas, upon the principle of *Boraston’s* case,|| and that *class of authorities, that the children of the daughter, who

[*219]

It might be argued, that the bequest over is upon either of two events, one of which might be within the period allowed by

† 16 R. R. 168 (2 Mer. 363).

26 R. R.

‡ 1 R. R. 46 (1 Cox, 324).

|| 3 Rep. 19.

§ 2 Bing. 151, to be reported in

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law; that the words, "in case there shall be no such child or children, or being such, all of them shall die under the age of twenty-three years, without lawful issue," refer to the alternative of there being no child living at the death of the tenant for life, Mrs. Bull, or of all the children dying without issue before they attain twenty-three; that the limitation over upon the former event is not too remote, and that that event may actually happen. Looking, however, at the language of the will, it seems to me that the events upon which the gift over was to take effect were these two; first, there being no child of Mrs. Bull—which event cannot take place; and secondly, there being a child, and that child dying under twenty-three—which is too remote.

The consequence is, that the limitations over after the death of Mrs. Bull are void, and, subject to her life interest, the next-of-kin are entitled to the leaseholds.

JONES v. MACKILWAIN.

(1 Russell, 220—225.)

1825.
Nov. 30.
1826.
April 20.
—
Rolls Court.
Lord
GIFFORD,
M.R.
[220]

A testator bequeathed a fund, which was to be produced by the conversion into money of the residue of his real and personal estate, to trustees, upon trust to pay the interest of one moiety to his daughter, for her separate use during her life; and, after her death, to pay 100*l.* a year to her husband during his life, and to apply the remainder of the dividends to the maintenance and education of all and every her children, until they attained twenty-one respectively, and when they attained their respective ages of twenty-one, upon trust to pay the principal to them in equal shares. The mother survived the testator, and left two children, who died under twenty-one: Held, that the moiety of the residue vested in these children.

EZEKIEL MACKILWAIN, by his will, dated the 14th of June, 1802, devised and bequeathed unto William Dysart and William Roberts, whom he also appointed his executors, and the survivor of them, and the heirs, executors, and administrators of such survivor, all his real and personal estate, upon trust to sell the same, and, after providing for some charges, to pay one half of the monies arising from such sale to his son, Richard Mackilwain, his executors and administrators. The other moiety of those monies they were to invest in the purchase of Consol.

8 per cent. Bank Annuities; the dividends of which were to be paid to his daughter, Ann Johanna De la Moussaye, during her life, to her separate use. The only disposition which the will contained of the dividends and capital of this moiety of the stock after her death was expressed in the following words:—

“And from and immediately after the decease of my said daughter, upon trust, that they, the said William Dysart and William Roberts, or the survivor of them, his executors or administrators, shall and do stand and be possessed of such the said monies, being one moiety of the produce of my said real and personal estate, and the interest, dividends, and produce arising therefrom, in trust, by and out of the annual interest, dividends and produce thereof, in the first place to pay unto the said Joseph De la Moussaye, her husband, in case he shall survive her, my said daughter, an annuity or clear yearly sum of 100*l.* for and during the term of *his natural life; and as to the remaining part of the said annual interest, dividends and produce of the said one moiety of the produce of my said real and personal estate, after such payment so made as aforesaid, in trust to pay and apply the same for and towards the maintenance, education, and breeding up of all and every the child and children of my said daughter Johanna, the wife of Joseph De la Moussaye, lawfully begotten, or to be begotten, for and until they shall severally attain their several and respective ages or age of twenty-one years; and from and after they shall severally and respectively attain his, her, and their ages or age of twenty-one years, as to all the said principal monies or stock so arising from the sale of my said real and personal estate, as and when they and each and every of them shall attain his, her, and their respective age and ages of twenty-one years, in trust to pay and dispose of the same unto and amongst all and every such child and children, their executors, administrators and assigns, in equal shares and proportions, share and share alike, as tenants in common, and not as joint tenants; and if but one child, then to such one child only.”

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v.
MACKILWAIN

[*221]

The testator died in June, 1803. Ann Johanna de la Moussaye died in 1804, leaving only two children;—Ezekiel Richard, who died in December, 1810, before he had completed his four-

JONES
v.
MACKILWAIN

teenth year; and Joseph Ferdinand, who died in June, 1822, in the eighteenth year of his age. Joseph De la Moussaye, the husband, died in August, 1818.

[*222]

The question in the cause was, Did the moiety of the residue vest in Mrs. De la Moussaye's two sons, so as to pass to their personal representatives, notwithstanding they both died under twenty-one; or, was the *vesting of their interests, as well as the absolute possession, postponed till that period?

Mr. Sugden and *Mr. Pepys*, for the personal representative of one of the children [cited *Booth v. Booth* †].

Mr. Roupell and *Mr. Wray*, for other parties [cited *Batsford v. Kebbell*, † and *Leake v. Robinson* §].

1826.
April 20.
[223]

THE MASTER OF THE ROLLS:

The distinction between the gift of a legacy to a person, to be paid to him at twenty-one, and a direction to pay or transfer the legacy to him at twenty-one is well known. In the former case, the legacy is considered as vesting in him immediately; but where the gift is merely by a direction to pay to him at twenty-one, the legacy does not vest forthwith: until he attains the specified age, he has no vested interest in the bequest.

It was contended that, in this case, there is no gift to the children of Johanna De la Moussaye, except in the direction to pay a moiety of the residue to them when they attain their several ages of twenty-one years; and that, in the events which have happened, that moiety is undisposed of. The authorities relied on were *Batsford v. Kebbell*, † and *Leake v. Robinson*. § On the other hand, it was argued, that the bequest here, being a gift to trustees and a disposition of a residue, came within the principle of *Booth v. Booth*. †

In this case, as in *Booth v. Booth*, the bequest is a bequest of a residue; and there has always been (to use the language of Sir WILLIAM GRANT ||), “a strong disposition in the Court to

† 4 R. R. 235 (4 Ves. 399).

‡ 4 R. R. 15 (3 Ves. 363).

§ 16 R. R. 168 (2 Mer. 387).

|| 16 R. R. 180.

construe a residuary clause so as *to prevent an intestacy with respect to any part of the testator's property." It is to be observed also, that the bequest of the moiety of the residue is to the trustees absolutely—one of the circumstances by which Lord ALVANLEY thought *Booth v. Booth* distinguished from *Batsford v. Kebbell*. Then, the interest of this moiety of the residue, with the exception of 100*l.* a year given to the father during his life, is devoted to the use of the children, till they attain twenty-one; so that the whole interest in this moiety, after their mother's death, is given to them absolutely. The gift of the dividends to the legatees during their minority is a circumstance, which has always been considered to be material in questions of this kind, as strongly marking the intention of the testator, that the legacy should vest, though a distant day is fixed for the absolute enjoyment of it.

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MAOKILWAIN
[*224]

Thus the whole interest and *corpus* of a moiety of the residue is given to the children of Mrs. De la Moussaye, in one way or another. The dividends are given to the trustees for the benefit of the children, until they severally attain twenty-one; and, at that period, the *corpus* is given to them. The gift to the trustees may be considered as made only for the convenience of the children.

Indeed, this case is much stronger than that of *Booth v. Booth*, because, in *Booth v. Booth*, the principal was given to two ladies only, "from and after their respective marriages." Yet Lord ALVANLEY thought that, though their marriage was an uncertain event, they took vested interests, and that the share of one of them, who died without having been married, passed by her will; and he says expressly that, "if the will had mentioned a particular age instead of marriage,† as the period to which *the enjoyment of the gift was to be postponed, there could be no doubt that these cases (the cases previously cited by him in support of the claim of the ladies to vested interests) would have absolutely governed it."

[*225]

This case is clearly distinguishable from *Leake v. Robinson*, and it seems to me to be governed by the principle of the decision in *Booth v. Booth*. The bequest is a gift of residue, and it is the

† 4 R. R. 235, 242 (4 Ves. 399, 409).

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MACKILWAIN

only residuary clause; it is a gift to trustees absolutely, and it is a gift to them for the benefit of Mrs. De la Moussaye's children; the yearly interest is given to these children till they attain twenty-one, and, when they attain that age, the principal is to pass into their possession; and there is no gift over, in the event of their death. My opinion, therefore, is that the children, though they did not attain twenty-one, took vested interests in this moiety of the residue.†

ANDREE v. WARD.

(1 Russell, 260—262; S. C. 4 L. J. Ch. 98.)

1826.
Feb. 14.
Rolls Court.
Lord
GIFFORD,
M.R.
[260]

A testator bequeathed a sum of stock to trustees, upon trust to pay the interest to his son during life, with a direction, if he married a woman with a fortune of a specified amount, to settle the fund upon her and the issue of such marriage; but in case of the son's decease, leaving no issue of his body, the stock was given over to various persons; and the testator also disposed of the residue of his estate. The son married a woman who had not the fortune required by the will, and died leaving issue of that marriage: Held, that the son's life interest in the stock was not extended, by implication, to a *quasi* estate tail;

That the issue of his marriage took no interest in the stock;

That the gifts over failed;

And that, after the son's death, the stock belonged to the residuary legatees.

THE will of George Greene, dated the 12th of August, 1762, contained, among other bequests, the following clause:—"I give, devise, and bequeath to my nephew, William Ward, and to my friends, Thomas Heacock and John Berne, and the survivor of them, and the executors, administrators, and assigns of such survivor, the sum of 5,500*l.* East India annuities, now standing in my name in the books of the said company; in trust, nevertheless, to pay the interest, dividends, and produce thereof to the proper hands of my said son, George Greene, for and during the term of his natural life; and in case he should marry any woman with 1,000*l.* fortune, then my will and mind is, that the said 5,500*l.* be settled upon his wife and the issue of such marriage;

† And see *Lane v. Goudge*, 7 R. R. 163 (9 Ves. 225).

but in case of my said son's decease, leaving no issue of his body lawfully begotten, then I give and bequeath 1,500*l.*, part of the said sum of 5,500*l.*, to George, John, and Charles Andree, children of my niece Charlotte Andree, to be divided between them equally, share and share alike; and I give the sum of 500*l.*, other part thereof, to my nephew John, the son of my brother Joshua." The testator went on to distribute the remainder of the stock among various other persons. The residue of his estate he bequeathed to William Ward.

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v.
WARD.

The testator's son, George Greene, married a woman who had not a fortune of 1,000*l.*; and there was not made upon her and her issue any settlement of the East India *annuities, or of the 3 per cent. Reduced Annuities, with which the former species of stock was afterwards consolidated. George Greene died in 1825, leaving three daughters.

[*261]

Upon this event, John Andree, in his own right, and as the personal representative of Charles Andree, filed his bill, claiming a portion of the 1,500*l.*, under the bequest over in case of the death of the testator's son, leaving no issue of his body.

Mr. Garratt for the plaintiff:

The testator meant to make a provision for the issue of his son, only in case he married a lady who had 1,000*l.* fortune; and it is for the sake of such issue alone, that the gifts over to the different persons, among whom he distributes the 5,500*l.* East India annuities, are postponed. The existence of issue, who cannot themselves claim the stock, will not exclude from the benefits intended for them by the will those who, so far as this fund is concerned, were, next to such issue as he has described, the objects of the testator's bounty. "In case of my said son's death, leaving no issue of his body lawfully begotten," must mean, "in case of his death, leaving no issue who could take under the prior gift." If any other construction be adopted, there will be an intestacy with respect to this specific fund; though it never could have been the purpose of the testator to leave any part of it undisposed of.

Mr. Pepys, contra.

ANDREE ^{c.} THE MASTER OF THE ROLLS :WARD.
[*262]

According to the construction contended for by the *plaintiff, we must insert the word "such," and read the clause, "in case of my said son's death, leaving no *such* issue of his body lawfully begotten;" that is, issue of a marriage with a lady who had a fortune of 1,000*l*. That is not what the testator has said. He has given the fund over, only in case of his son's death leaving no issue generally. The son has left lawful issue, though not issue of such a marriage as the testator had before described; and consequently the event has not happened, on which the title of the plaintiff was to arise.

Bill dismissed.

[Note.—See the next case.]

GREENE v. WARD.

(1 Russell, 262—265; S. C. 4 L. J. Ch. 99.)

1826.
May 10.
July 17.Rolls Court.
Lord
Gifford,
M.R.
[262]

AFTER the dismissal of the bill in the case of *Andree v. Ward*, one of the daughters of George Greene filed her bill, claiming to be entitled absolutely to the 5,500*l*. stock, either alone, as his personal representative, or, along with her two sisters, as the issue of his body.

Mr. Rolfe, for the plaintiff:

[*263]

In *Love v. Windham*,† it was held "that a devise of a term to one and his issue, with a remainder over, is all one with a devise to one for life, and, if he dies without issue, to another." Here the gift is, first to George Greene for life, and, in case of his decease, leaving no issue of his body, remainder to another; which is equivalent *to a gift to George Greene and the issue of his body, with remainder over, in case of his decease leaving no issue. The words of the will, therefore, being such as in freeholds of inheritance would have given George Greene an estate tail, confer on him the absolute interest in this personal chattel.

† Levinz, 290.

Mr. Pepys for the other children of George Greene :

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WARD.

George Greene takes only an estate for life, and there are no words which can extend his interest beyond that limit. On the other hand, it is clear, that, in the event which has happened, the remainders over do not take effect, and that it was not the intention of the testator that this portion of his property should be included in the general residue. The remainders over were postponed for the sake of the issue of George Greene's body ; and it is only by giving the issue an interest in the fund, by implication, that all the words of the testator can be satisfied, and his intention effectuated.

Mr. Wright, for the personal representative of William Ward, the residuary legatee.

THE MASTER OF THE ROLLS :

July 17.

Those who represent George Greene contend, in the first place, that the effect of the testator's words is to create a *quasi* estate tail in George Greene, and, consequently, to give him the absolute property of this personal chattel. If that construction cannot be maintained, they say, in the second place, that there is at least an implied gift to the issue of his body. On the other hand, some of those to whom the fund is in one event given over contended, in a former suit, that the bequest over had taken effect ; but my opinion upon *their claim was, that the fund was given over, not in the event of the son's dying without leaving issue of a marriage with a woman who had 1,000*l.* fortune, but only in case he died without leaving any issue of his body lawfully begotten ; and that event had not happened. Lastly, the residuary legatee asserts that George Greene did not take the fund absolutely ; that there is no implied gift to his issue ; that the limitation over has failed by reason of his having left issue ; and, therefore, that this portion of the property, not being otherwise disposed of, must fall into the general residue.

[*264]

I am of opinion, that the words in this will are not sufficient to create an estate tail in George Greene. The fund is given over, not upon a failure of George Greene's issue generally, but upon his leaving no issue of his body at the time of his death ; and no

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v.
WARD.

case has been cited to shew, that from such words an estate tail can be implied. When a bequest is to A. B. for life, and on failure of his issue generally, remainder over, it has been held that A. B. will take an estate tail : but that is altogether different from a case in which the property is given to A. B. for life, with a limitation over in case he should die without leaving issue at the time of his death ; and I have been unable to find any instance, in which a bequest, like that which I have last mentioned, has been held to give A. B. an estate tail. The gift over is valid, but there is no estate tail in the first taker.

In this case it was unquestionably far from the intention of the testator, that the effect of his bequest should be, to give his son the absolute property of the fund. The only issue he meant to benefit were issue of a marriage with a woman who had 1,000*l.* fortune ; and they were to enjoy the benefit, not through their father, but by means of the settlement directed by the will. To *imply an estate tail in the father, would be to defeat completely the testator's intention.

[*265]

Neither can we, from these words, imply a gift to the issue of George Greene. If a sum of money is bequeathed to A. B. for life, and, if he dies leaving no issue, then to another, that does not raise any implication in favour of the issue of A. B. ; though, if he dies leaving issue, the gift over does not take effect.

Under these circumstances, there has been no specific disposition of the property ; for George Greene had only a life-estate in it ; the issue of his marriage had no interest in it, and the gift over has not taken effect. Therefore the residuary legatee is entitled.

SMITH *v.* ATTERSOLL.†

(1 Russell, 266—276.)

A testator bequeaths a legacy to A. and B. in trust for certain purposes, which the will states to have been fully explained to them. On the same day a paper writing is signed by A. and B., in which they declare that the bequest is upon trust for six persons, whose names are stated: and, after their signature, some lines are added in the handwriting of the testator, by which a seventh person (an unborn child) is admitted to a share of the legacy. Upon a bill, filed by one of the six persons named in the body of the paper writing, the Court recognized the paper writing as a valid declaration of trust, though it had not been proved as a testamentary paper.

JOSEPH ATTERSOLL, by his will, dated the 3rd of September, 1811, bequeathed fifty Commercial Dock shares to his two sons, Joseph Attersoll and John Attersoll (who were also his executors), in trust for certain purposes, which, the will stated, had been fully explained to them. The testator died in February, 1812, leaving the shares standing in his name. The executors proved the will in August, 1815.

On the same day on which the will was executed, the sons, Joseph Attersoll and John Attersoll, signed a paper writing, which was to the following effect:—"Joseph Attersoll, of Fulham, having this day bequeathed by will fifty shares to his two sons, Joseph and John Attersoll, in trust for certain purposes, this is to certify that we the undersigned are willing to accept the said trust, and that the conditions of it are, as we understand, to apply the interest of such fifty shares to the maintenance and education of six children; viz. Jane, Henry, and Frederick Smith, and Olivia, Harriet, and Alfred Parker, and the principal to be divided between them on their respectively attaining the age of twenty-one years, in such manner as that the boys may receive a sum double the amount of the girls; such shares to remain in stock of the said Commercial Docks until Jane and

1826.

Feb. 15, 20.

July 19.

*Rolls Court.*Lord
GIFFORD,
M.R.

[266]

† *Note*.—Under the Wills Act, 1837, 1 Vict. c. 26, a trust imperfectly declared by will cannot be supplemented by a subsequent writing not duly executed in compliance with the provisions of the statute, and parole evidence would be still less

available for that purpose.

In *Sidgreaves v. Brewer* (1880) 15 Ch. D. 594, 49 L. J. Ch. 514, the testator's instructions were reduced into writing in his presence before the execution of the codicil by which the trusts were created.—O. A. S.

SMITH Henry, now eleven years of age, shall become twenty-one, and
 v.
 ATTERSOLL. only sold out as the children shall become of age ; and we further
 undertake to superintend their education, &c.

“JOSEPH ATTERSOLL, jun.

“September 3, 1811.

“JOHN ATTERSOLL.

“Signed in the presence of

“H. GILLEND,

“A. OWEN.”

[267] “In case of there being a seventh child born before the year 1812, it is my wish that child should be equal partaker of the advantages arising from the shares with the other six.”

The clause, which came after the signature of the executors, was admitted to be in the handwriting of the testator.

The testator took the paper, after it was signed, into his own possession, and it did not again come into the hands of his executors. A short time after his death, it was found in the custody of Olivia Parker, the mother of some of the children named in it, as well as of another child, Charlotte, who was not born till after the 3rd of September, 1811.†

The executors never proved this writing as a testamentary paper, though application had been made to them for that purpose.

The bill, filed by Jane, one of the children mentioned in this document, prayed, that the bequest of the fifty Commercial Dock shares, and the trusts expressed in the paper writing, might be established and carried into execution.

[*268] The executors by their answer admitted, that the paper writing was a declaration of the trusts of the fifty Dock shares ; that it stated the purposes for which the testator had bequeathed them ; and that the plaintiff, the other five children who were named along with her, and Charlotte Cross, were the persons interested in them. They further stated, that * * they did not believe his assets would be more than sufficient for the payment of his debts.

† It was assumed in the argument at the Bar, that Charlotte was born before 1812.

Sir Giffin Wilson and *Mr. Flather*, for the plaintiff, asked a general account of the testator's assets.

SMITH
C.
ATTESOLL.

Mr. Horne and *Mr. Blunt*, for the defendants, the executors :

* * The will contains no reference to this document, which could cause the document to be regarded as part of the will; and the paper cannot be treated as a mere declaration of trust. It has none of the requisites of a trust-deed; it is not even stamped; and the lines subjoined in the handwriting of the testator are clearly testamentary. If any part of it is testamentary, that part at least must be proved, before the Court can act. [They cited *Smart v. Prujeant*† and other cases.]

Sir Giffin Wilson and *Mr. Flather*, *contra* :

The paper is not signed by the testator. * * If it required probate, it was the duty of the executors, and not of the plaintiff, to have propounded it in the Ecclesiastical Court; and they will not be allowed to take advantage of their own negligence. Besides, the plaintiff can rely on the admissions in the answer. [They cited *Inchiquin v. French*.‡]

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Mr. Horne in reply :

The admissions in the answer will not avail the plaintiff; for the defendants admit the alleged trust only as expressed in and with reference to this paper writing: and, therefore, unless the Court is prepared to act upon that instrument, it cannot give the plaintiff a decree. It is not the duty of the executors to prove the document in question; for they do not rely upon it, and they may have a thousand objections to its validity. As the plaintiff founds her title upon it, she is the person who ought to have cited the executors to prove it; and any question, *to which it might give rise, would then have been brought before the proper tribunal.

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† 5 E. R. 393 (6 Ves. 560).

‡ *Ambler*, 33 (incorrectly reported in 1 Cox, 1), see observations of

HALL, V.-C. in *Sidgreaves v. Brewer*, 15 Ch. D. at p. 603.—O. A. S.

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Whether the plaintiff can sustain this suit, is a question, which depends entirely on the admissibility of the paper writing of even date with the will. The executors contended, that that document is in its nature testamentary ; that the Ecclesiastical Court can alone determine, whether it is or is not testamentary ; and, that, if it is testamentary, this Court cannot look at it, inasmuch as it has not been proved. On the other hand, it was said that it could not be proved as a testamentary paper, because it was signed by the trustees ; that it must be considered as an admission by them of the nature of the trusts to which the testator had alluded in his will ; and that, as against them, it was evidence of what the trusts were, upon which the fifty shares were bequeathed. *Lord Inchiquin v. French* was cited, as a case in which a document, declaring the trusts of a legacy, had been received, though not proved in the Ecclesiastical Court : and the arguments, it was said, for the admission of the document here were much stronger than any that could have been urged there ; since, in the present case, the paper had not been signed by the testator himself.

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I had considerable difficulty on the point, in consequence of the addition made to the paper in the handwriting of the testator, which had the aspect of being of a testamentary nature. Upon consideration, my opinion is, that the paper signed by these trustees is not to be considered *as testamentary, and may be received as evidence against them of the nature of the trusts on which the shares were held by them. The testator, in his will, says, that he has fully explained to them the purpose for which the shares were bequeathed to them in trust ; they, by this paper, admit what the purposes were, which were thus explained to them ; and their answer contains the same admission. Now, without considering whether the case of *Inchiquin v. French* could be pushed to the extent of holding that a paper signed by the testator himself, explanatory of the trusts of a legacy, can be regarded as a declaration of trust, and as not being testamentary, it seems to me, that the paper in question, not being signed by the testator, but being signed by the two trustees, is an admission under their hands, and an explanation by them, of

the trusts intended to be fixed on this property. If they had not signed any such paper, and it had been put to their conscience whether the legacy was not given to them upon trust for these children, their declaration or admission of those trusts upon oath in their answer would have been evidence against them, and would have entitled the plaintiff to the assistance of this Court. Therefore, whatever may be the effect of the two lines which are added in the handwriting of the testator, the children, of whom this plaintiff is one, have a beneficial interest in the legacy, not as legatees under the will, but as cestuis que trust, in whose favour a trust has been declared in this paper, under the hands of the trustees themselves.

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The title being in the children, not as legatees, but as cestuis que trust, they would have no right, in the first instance, to call for a general account of the testator's assets. But the trustees are also the personal representatives of the testator; and they by their answer *deny that they have assets, out of which they can, *quà* trustees, satisfy this legacy. Therefore, considering, as I do, that the plaintiff has established her right to a part of these fifty shares, if there are assets sufficient for that purpose; that the paper is evidence of the trusts impressed on the property, and gives the plaintiff a right against the trustees, who have signed it; that these defendants unite in themselves the double character of trustees for the plaintiff and of executors of the testator; and that they by their answer deny that they have, in their character of executors, assets, wherewith to discharge the duties imposed on them as trustees;—considering these circumstances, the Court must decree a general account against them in their character of executors.

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* * * * *

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The answer of Joseph Attersoll and John Attersoll fully admits the existence of the paper writing under which the plaintiff claims; that it was signed by them on the day on which their father's will was executed; that the trusts therein declared are those on which the fifty Commercial Dock shares were bequeathed to them; and that the plaintiff is one of the persons in whose favour the trust was created. The objection to her demand is

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simply this, that the paper cannot be received in evidence, because it is in its nature testamentary, and must therefore be proved in the Ecclesiastical Court, before a court of equity will act upon it. Thus the question is, can the plaintiff on the admissions in the answer, and the proof or admissions of the paper writing in the cause, call for the application of the shares, according to the trusts declared of them, though the paper which declares the trusts has not been proved by the executors?

[*274] There are several cases on this subject. In *Jones v. Nabbe*,† a daughter, having deposited 180*l.* in the hands of her mother, made a will appointing her executrix, but making no mention of the 180*l.* Afterwards, she desired her mother to give that sum to Jones, if she thought fit. The daughter died; the mother proved the will; and Jones filed a bill for the *180*l.* The mother admitted the request made to her by her daughter, but insisted, that it was left to her election, whether to give the money to the plaintiff or not. One question was, whether, under such a declaration of trust, the plaintiff could succeed in establishing a claim. “If the defendant,” it was held, “had insisted on the Statute of Frauds and Perjuries, the Court would not have relieved the plaintiff as upon a trust: but, the defendant having by answer confessed the truth, there was no danger of perjury from the variety of witnesses, which was the mischief the statute intended to provide against; and therefore the Court took it to be in the nature of a trust, and decreed for the plaintiff.” In that case there was no written instrument, declaring the nature of the trust on which the money was left in the hands of the executrix; but, the executrix, on whom the property devolved, having admitted the trust, it was held, that the trust ought to be enforced.

In *Crook v. Brooking*,‡ Mallock bequeathed 1,500*l.* to Simon and Joseph Snow, to be disposed of on such secret trust as he had privately revealed to Simon: and, in that respect, it bears a very close resemblance to the present case; for the testator here has bequeathed the property in question to Joseph and John Attersoll on trusts, which, he states in his will, he has fully explained to them. After Mallock’s death, Simon Snow, in a

† Gilb. Eq. Rep. 146.

‡ 2 Ver. 50, 106.

letter written by him to Joseph, stated what the trusts of the 1,500*l.* were. The LORD CHANCELLOR first, and afterwards the Lords Commissioners, were of opinion, that the trust was well and sufficiently declared by that letter. I may notice, that here part of the declaration of trust is by the two trustees, and not by the testator; so that, *in this point, as well as in the other, the case before me is almost precisely similar to that of *Crook v. Brooking*.

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The next case on the subject is, the *Earl of Inchiquin v. French*.† Lord Thomond by his will gave 20,000*l.* to Sir William Wyndham: and, by a deed poll of the same date, which referred to his will, he declared, that the legacy was given to him upon trust for Lord Clare. Sir William Wyndham died in the testator's lifetime, and the deed poll was not proved. The question was, whether, though the legatee named in the will had died before the testator, the person, who was the cestui que trust of the legacy, and was substantially the legatee, was entitled to the 20,000*l.* under the deed poll, which had not been proved as a testamentary paper. Lord HARDWICKE held, that the deed poll, though never proved, sufficiently declared the trusts of the legacy of 20,000*l.*, and decreed accordingly.‡

In *Metham v. The Duke of Devon*,§ the Earl of Devonshire directed his executors to pay 8,000*l.* as he should by deed appoint. He afterwards by deed appointed the 8,000*l.* to all the children of his son by Mrs. Heneage; and the Court held, that the deed, though it does not appear to have been proved, referring to the *will, was a sufficient declaration of the trusts which were to attach on the 8,000*l.* in the hands of the executors. In this case the will states, that the bequest of fifty shares in the Commercial Dock Company, is upon certain trusts which he has disclosed to

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† Ambler, 33 [see note, *ante*, p. 43].

‡ The statement of the decree in the report in Cox, is, that his Lordship declared, "that the legacy of 20,000*l.* given by the said will to Sir William Wyndham, and by the said codicil declared to be in trust for Lord Viscount Clare, is a subsisting legacy." 1 Cox, 9.

In *Metham v. The Duke of Devon*, the term "codicil" is in like manner applied by the Court to the deed which referred to the will. "His Lordship conceived the said deed poll to be part of the will of the late Earl of Devon, in the nature of a codicil thereto, explanatory of the will." 1 P. Wms. 530, note.

§ 1 P. Wms. 529.

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his executors. These executors by their answer admit that they are trustees, and state what the trusts are. Although, therefore, it may be contended that the paper signed by the executors, and to which an addition was made by the testator, was in its nature testamentary, and though perhaps it might have been proved, yet, looking as well at the authorities as at the principle on which the question must turn, I am of opinion, that that paper is sufficient evidence of the trusts on which the fifty shares were to be held; and under those trusts the plaintiff is entitled.

1826.

Feb. 20.

April 20.

Rolls Court.

Lord
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FLEMING v. BURROWS.

(1 Russell, 276—282.)

A bequest of "my furniture, plate, books, and live stock, or what else I may then be possessed of at my decease," will pass the general residuary estate, though followed by specific bequests and devises to the same person, and by gifts of pecuniary legacies to various other persons.

THE will of Sir Daniel Fleming, bearing date on the 27th day of June, 1818, contained bequests expressed in the following words:—"As for such temporal estates, as God in his mercy hath bestowed upon me, I give and dispose of the same as followeth; that is to say, I give, grant, devise, and bequeath unto my natural son Daniel Fleming of Crossthwaite and Lyth in the county of Westmoreland, viz. all my lands, freehold and customary, with the houses and outbuildings, situate in the above-named township, known by the names of Hill Top, Wincklow, and Calmire Hall, with all belonging to them; likewise my furniture, plate, books, and live stock, or what else I may then be possessed of *at my decease; also my shipping and ropery concerns at Workington and Harrington, the fee-farm and penny rents at Crossthwaite, near Keswick, in the county of Cumberland, my said natural son Daniel Fleming, paying all my just debts and funeral expenses; I leave to Elizabeth Cragg, my housekeeper, the sum of 400*l.* to be paid a month after my decease. I also leave to my child unborn 1,000*l.*, whether boy or girl, to be given it when it arrives at twenty-one, and the interest for maintenance; in case the child should die before it arrives

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at twenty-one, then the 1,000*l.* to go to my natural son Daniel Fleming. I also leave to my brother Richard Fleming, the sum of 20*l.*, and to Barbara Benson and Isabella Burrow, each of them 20*l.*, to be paid a month after my decease." He concluded by naming three executors, to each of whom he bequeathed 10*l.*

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The question was, whether the words, "or what else I may then be possessed of at my decease," passed the general residue of the testator's personal property to Daniel Fleming, or were to be construed as a bequest merely of articles *ejusdem generis* with those specified in the preceding part of the sentence, viz. "furniture, plate, books, and live stock."

Mr. Heald and Mr. Duckworth for Daniel Fleming :

The words are general enough to pass everything of which the testator was possessed; and there is nothing in the context to limit them to a more restricted sense. The case comes within the principle of construction adopted by Lord THURLOW in *Bennet v. Bachelor*.†

Mr. Sugden and Mr. Walker, contra :

It is impossible not to suspect from the connection of the sentence, that "then" has here crept in by mistake, instead of "there;" and if that supposition be admitted, the bequest, having a reference to locality, will clearly be specific. Even taking the words as they appear in the probate—the gift of "what else I may be possessed of," is so closely connected with the enumeration of furniture, plate, &c. that it must be held, on every principle of rational construction, to pass only articles *ejusdem generis*. It is worthy of observation, that the words, upon which the question arises, are joined to the preceding part of the sentence, not by the copulative "and," but by the disjunctive "or;" plainly shewing, that the object of the testator was, to declare that his prior gift was not to be confined strictly to household furniture, plate, books, and live stock, but that, if he died possessed of other articles of the same kind, which he had forgotten, or might not be able to enumerate, these were all to pass to his natural son. The subsequent part of the will is altogether inconsistent

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† 3 Br. C. C. 29 [see judgment, *post*, p. 52.]

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with the notion, that the words, "what else I may be possessed of," were intended to be a residuary clause. Why did the testator go on to give to the same legatee his shipping and ropery concerns, which a residuary clause would necessarily have included? or how could he, after disposing of the whole residue, proceed to bequeath large pecuniary legacies to other persons, and likewise to give a contingent interest in remainder in one of those legacies to the very person who was his supposed residuary legatee? In *Rawlings v. Jennings*† the words of bequest were equally general; and the grounds for restricting their sense, were neither so many nor so strong, as those which occur here.

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It is apparent, in looking at this will, that Daniel Fleming, the testator's natural son, was the chief object of his bounty; and, though the introductory words clearly express an intention to dispose of all his temporal estate, there is in the instrument no residuary clause, unless the words, "or what else I may then be possessed of at my decease," are to be so construed. That these words would be sufficient, taken *per se*, to pass the general personal estate, cannot be denied. But it has been suggested, that "then" has been written by mistake for "there." And undoubtedly, if we were to read "there" instead of "then," there would be enough to restrain the generality of the expression. The Court, however, cannot alter the language of the will; and looking at the whole frame of it, there is nothing which would authorise us to construe "then" as meaning "there."

It was contended, that the context of the will shewed that the words "what else I may be possessed of," ought to be restrained to things of the same kind with those previously enumerated,—furniture, plate, books, and live stock. But I apprehend, that the enumeration of certain articles in that part of the clause would not of itself be sufficient to restrain the generality of the gift.

It was then said, that in the subsequent part of the will there are bequests inconsistent with the idea that the testator had made, or supposed himself to have made, a complete disposition of everything belonging to him: for he goes on to give to the

† 9 R. R. 137 (13 Ves. 39).

same Daniel Fleming his shipping and ropery concerns at Workington and Harrington, together with the fee-farm and penny rents at Crossthwaite; and he afterwards leaves to his housekeeper *and other persons various pecuniary legacies to a considerable amount. The case principally relied on, in support of this part of the argument, was *Rawlings v. Jennings*.† “I give,” said the testator, in that case, “unto my wife, Alice Jennings, 200*l.* per year, being part of the monies I now have in Bank securities, entirely for her own use and disposal, together with all my household furniture and effects of what nature or kind soever that I may be possessed of at the time of my decease.” He then gave several pecuniary legacies, and also some specific bequests of East India stock, and of monies that he had in Bank securities. Sir WILLIAM GRANT held, “that the widow’s claim of the whole residue of the personal estate, as passing to her under the general word ‘effects,’ could not be sustained; and that, part of his property being particularly given to her afterwards,‡ the word ‘effects’ must be confined to articles *ejusdem generis*, with those specified in the preceding part of the sentence, viz. household furniture.” Now it is to be remarked, that, in that case, the testator, in the very bequest under which the widow claimed the residue, bequeathed to her only a specific portion of the monies he had on Bank security; and it would have been altogether inconsistent to have held, that the word “effects” extended to every species of property, when it was not only preceded by a gift of household furniture, but was contained in a clause by which only a specific portion of one species of property was given to her.

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It is true, that, in the present case, the testator, after *the bequest of what he might be possessed of at his decease, gives Daniel Fleming his shipping and ropery concerns, and his fee-farm and penny rents. But in *Bennet v. Batchelor*,§ the same

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† 9 R. R. 137 (13 Ves. 39).

‡ In this part of the report of *Rawlings v. Jennings* there is some perplexity; for though the widow and the son, as executor and executrix, took the residue beneficially, yet, in the will, so far as it is set

forth, no part of the testator’s property is particularly given to the widow afterwards, nor is any allusion made to such a circumstance in the argument against her claim.

§ 3 Br. C. C. 27.

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circumstance occurred. There a testator gave to "Jenny Powel (to whom he had before devised real estates, and had also given specific bequests,) all his household goods, books, linen, wearing apparel, and all other, not before bequeathed, goods and chattels, that he should be in possession of at the day of his decease, (except the plate and legacies before and thereafter given and bequeathed:)" and this bequest was followed by a gift to the same legatee of "all monies that should be due to him from his tenants, or other persons, at the time of his decease, that she might be enabled to pay all his just debts." It was there argued, that to construe the words "goods and chattels that he should be in possession of at the day of his decease," as a general residuary clause, was quite inconsistent with the immediately following bequests to her of the debts due to him. Yet Lord THURLOW held, that he might not have known that debts would pass by the words, "goods and chattels;" that the subsequent clause was only cumulative, added *ex majore cautela*, to prevent any doubt, and not with a view to restrain the effect of the preceding words; and that the bequest would undoubtedly pass the residue. In like manner, in the present case, is it not a natural construction, that a person ignorant of the legal effect of words might imagine, that the law would not consider the expression "what else I may be possessed of at my decease," to be sufficient to pass property of that description to which the testator's shipping and ropery concerns, and fee-farm and penny rents belonged?

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Therefore, looking at the whole of this will, in which it is evident, that the great object of the testator's bounty and attention was his natural son, and in which he has used words so general, as to be sufficient, taken *per se*, to pass to that natural son the residuary estate, unless they are restrained by something in the context; it appears to me, that neither the case of *Rawlings v. Jennings*, nor any other reported authority, contains anything that would warrant me in limiting the generality of the testator's expressions, and that the Court is bound to give effect to the words which he has used.

The consequence is, that there must be a declaration that Daniel Fleming is entitled to the residue of the estate.

ADAMS *v.* CLIFTON.

(1 Russell, 297—301.)

The trustee of a legacy, which had been invested in stock, authorises the sale of the stock, and permits B. to receive the proceeds; B. retains the money in his hands; and during many years, the legatee, who was not aware that the legacy had ever been invested in stock, or that stock, in which it once was invested, had been sold, deals with B. as the only person accountable to her for the money: notwithstanding these dealings on the part of the legatee, the trustee continues to be accountable for the stock. The legatee's ignorance of the facts precludes the trustee from alleging that the breach of trust had been condoned by acquiescence.

UNDER the will of John Huish, who died in 1797, his two infant grandchildren, Henry Adams and Eleanor Adams, were entitled to a legacy in equal shares. *To satisfy this legacy, a sum of 859*l.* 16*s.* 9*d.* Reduced Three per cent. Bank Annuities was set apart, by his executors and trustees William Holles and Isaac Moody Bingham; and at the death, in 1807, of Isaac Moody Bingham, who was the surviving executor and trustee, it was standing in their names. Isaac Moody Bingham appointed his daughters, Mrs. Hippuph and Mrs. Clifton, his executrixes; but his son Richard Bingham was allowed to take the principal share in the management of his affairs, under an idea, that he, being heir-at-law, was also personal representative of his father; and it was by him that the accounts concerning the legacy were kept, and that payments, in respect of the dividends, were made to the Adamses.

In 1809, Henry Adams being of age, and having applied to Richard Bingham for his share of the legacy, Mrs. Clifton, who was then the sole surviving executrix of Isaac Moody Bingham, executed a power of attorney for the sale of the stock, in which her husband Francis Clifton concurred. The 859*l.* 16*s.* 3*d.* Reduced Three per cent. Bank Annuities was accordingly sold, and the proceeds paid to Richard Bingham, who, after satisfying the claim of Henry Adams, retained the residue in his own hands. Francis Clifton died subsequently; and his widow Mrs. Clifton, and his son Marshall Waller Clifton, became his personal representatives.

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In 1822, Richard Bingham took the benefit of the Insolvent Act; and shortly afterwards Eleanor Adams filed her bill against Mrs. Clifton and Marshall Waller Clifton for an account and payment of what was due to her, in respect of her share of the stock. From 1809, the date of the sale of the stock, down to 1821, Eleanor Adams from time to time received from Richard Bingham payments on account of the dividends of her legacy, and *occasionally also on account of the principal. She knew that the money belonging to her was in his hands; she applied to him when she was in want of cash; she uniformly treated him as her debtor; she more than once pressed him to give her a mortgage, or some security for it; and in 1815 she threatened to file a bill against him. In 1819 he was imprisoned for debt, and she, along with several of his creditors, signed a letter of licence to him. During the whole of this time, she made no application to, nor pretended to have any demand against Mrs. Clifton. Up to 1814, Richard Bingham was in affluent circumstances, and could easily have satisfied any demands against him.

On the other hand, Mr. Richard Bingham, who was examined as a witness for the defendants, stated, "that he did not suppose that Eleanor Adams knew exactly that the property to which she was entitled under the will of Huish, had been invested in Three per cent. Reduced Bank Annuities by the executors, or that the same had been sold, and the proceeds retained by him." There was no evidence that she was aware, till shortly before the institution of the suit, that her share of the legacy had been invested in stock, or that the stock had been sold, or that Richard Bingham had no authority to act as the agent of Mrs. Clifton, or that Mrs. Clifton was the personal representative of Huish, or that Mrs. Clifton was, or ever had been, or could be made liable for the legacy.

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The bill stated, that, at the time of the sale of the stock in 1809, the plaintiff was under age; and though the answer denied that allegation, and there was some evidence against it, the opinion of the Court was, that the balance of testimony was decidedly in the plaintiff's favour on that point, and that she did not attain her full *age till after 1809. Then the only question was, whether the dealing, which had taken place

between the plaintiff and Richard Bingham, was such as would amount to an acceptance of him as her debtor, and would release Mrs. Clifton from her original liability, in respect of the sale of the stock in 1809.

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Mr. Heald and Mr. Knight for the plaintiff.

Mr. Horne and Mr. Simpkinton for the defendant.

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July 4.

Supposing Eleanor Adams to have been of age when the stock was sold, there is nothing to shew, that, in her subsequent dealings with Richard Bingham, she was conusant of her rights. Indeed, the evidence, particularly that of the defendant's witness, Richard Bingham, tends quite the other way. Eleanor Adams was not aware that stock had been invested for her and her brother's benefit, or that the stock so invested had been sold; and although, under the supposition that Richard Bingham was the person who was bound to account to her, she from time to time applied to him for money, and received small sums from him, her receipt of those small sums down to 1821, being in total ignorance of what had really taken place, cannot be regarded as in affirmance of what had been done in 1809.

The same observation applies to the circumstance of her having, upon the insolvency of Bingham, signed a letter of licence to him. It cannot be contended, that her participation in that arrangement was in affirmance of prior transactions, or exonerated the representatives of the trustees from the liability which the sale of the stock imposed upon them, unless she had been aware *of what had taken place previously. This plaintiff therefore is entitled to the relief she asks. The decree must be for an account of what is due to her for her share of the stock, and of the dividends on it; and the decree must be with costs.

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1826.
Feb. 24.

LE GRAND v. WHITEHEAD.

(1 Russell, 309—311.)

Rolls Court.

Lord
GIFFORD,
M.R.

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In a suit by a vendor for specific performance, the decree at the original hearing having directed merely a reference of title, the Court will not, at the hearing on further directions, enter into the consideration of any other objection which the answer had set up against the execution of the contract.

PARTICULARS of sale, headed "Brick Earth and Land—Copyhold—held of the Manor of Fulham," described Lots I. and II. as containing a large quantity of superior marle or brick earth; adding, that specimens of the marle or brick earth might be seen on the estate, and that an agent would attend to shew them.

The bill was filed for specific performance against the purchaser of the two lots. He by his answer admitted the contract, but denied that the vendors could make a good title; and he insisted, that, as he had been led, in consequence of the representations contained in the particulars, to purchase the premises for the purpose of digging marle and brick earth to manufacture bricks and tiles for sale, he ought not to be compelled to perform the contract, unless the vendors could shew, that the copyholders of the manor of Fulham were entitled by custom to dig marle and brick earth.

By the decree at the original hearing, it was referred to the Master to inquire, whether a good title could be made to the premises, and when it first appeared that a good title could be shewn.†

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On the proceedings before the Master, an objection was taken, that the vendors did not shew that the copyholders of the manor had a right, without the license of the lord, to dig marle and brick earth from the lands holden by them. The Master, however, being of opinion that the decree did not authorise him to enter into this question, certified in favour of the title, and that it appeared, before the filing of the bill, that a good title could be made. The report was confirmed. Afterwards the purchaser presented a petition, praying a reference to the Master, to

† It did not appear, that the decree contained any declaration that the contract ought to be performed specifically.

inquire whether the copyholders within the manor of Fulham were entitled by the custom to dig marle and brick earth from the lands holden by them, and when it was first shewn that they possessed such a right. The petition had been ordered to come on at the same time with the hearing of the cause on further directions. LE GRAND
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Mr. Sugden and Mr. Wakefield for the petition, and for the defendant in the cause :

The decree was taken in the common form, because it was supposed, that the question of title would have included the right of digging the brick earth. The Master, however, was of opinion, that he could not enter into the consideration of the latter subject ; and that he was to report only on the title to the land. We could not except to the report, because we do not now contend that there is not a good title to the land ; and that is all which the Master means to certify. But we say that it is not enough that we have a title to the copyhold ; we must have power to dig that brick earth and marle, which the particulars of sale represented as constituting the value of the premises, and which was an inducement to us to become a purchaser. We do not seek anything inconsistent with the former decree ; we desire merely a supplementary *inquiry, without which it is obvious, on the record as it actually stands, that justice cannot be done between the parties. It is quite regular to do this on further directions. The petition is not in the nature of an exception to the report ; it serves merely to direct the attention of the Court to an important part of the case, appearing on the bill and answer, which has not been yet disposed of. [*311]

Mr. Shadwell and Mr. Girdlestone, contra.

THE MASTER OF THE ROLLS :

The defendant by his answer insisted, that he was not bound to perform the contract, unless it could be shewn that copyholders of this manor were entitled to dig marle and brick earth on the lands holden by them. Had the Court thought it necessary to inquire into the point, a direction to that effect would

LE GRAND v. WHITEHEAD. have been contained in the decree. Instead of doing so, the reference, which it orders, goes only to title: the Master has reported that a good title can be made, and that it could have been made before the filing of the bill; and no exception is taken to the report. The original decree either did or did not authorise the Master to take into his consideration, in examining the question of title, the right of the copyholders to dig the marle and brick earth. If it did not, then the Court never intended that there should be any inquiry into that subject: if it did, the defendant ought to have taken exceptions to the report. To grant the prayer of this petition would be to alter entirely the decree made at the original hearing; which it is not competent for the Court to do at the hearing on further directions.

Decree for specific performance with costs.

The petition dismissed with costs.

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(1 Russell, 325—331.)

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It being necessary, in order to make a title perfect, that a recovery should be suffered for the purpose of barring an old estate tail vested in a person who was not a trustee for the vendor, the deed making the tenant to the *præcipe* and the warrant for suffering the recovery were executed before the filing of the bill for specific performance, but the recovery was not completed till a few days afterwards: Held, that a good title was not shewn before the commencement of the suit.

A person, who purchases two lots, is not justified in refusing to perform his contract for the purchase of the second lot, because a good title is not shewn to the first lot.

THE bill sought a specific performance of a contract to purchase certain premises comprised in two lots, which had been sold separately at the same auction, and in respect of which the purchaser had signed distinct memorandums acknowledging himself to have been the highest bidder.

The usual reference having been directed, the Master reported in favour of the title to both lots; and he found, that a good title was shewn to lot 2 on the 2nd of March, 1821, and to lot 1

on the 25th of June, 1821. The defendant insisted, by an exception to the latter finding, that a good title was not shewn to lot 1, until the 14th of July, 1821.

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The question depended on the following circumstances :

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It appeared in the abstract originally delivered, that the title was derived under the family of the late Earl of Bridgewater ; one of whose ancestors, conceiving himself to be tenant in fee, had conveyed to the parties through whom the plaintiff claimed. It turned out, however, that the premises were, at the time of that conveyance, subject to an entail in Lord Bridgewater's family ; and that the estate tail was still subsisting, and had become vested in Lord Bridgewater. Application was made to that nobleman, who immediately agreed to suffer a recovery, in order to enable the plaintiff to complete his title. For that purpose a deed making a tenant to the *præcipe* was prepared ; and, on the 25th of June, the plaintiff delivered to the defendant an additional abstract, stating this deed of release, but leaving the date of it in blank, and not representing it otherwise than as an instrument which had not yet been executed. On the 2nd of July the deed was executed by Lord Bridgewater and Lady Bridgewater ; and, on the same day, the warrant of attorney to suffer the recovery was signed and acknowledged by them. The recovery was duly suffered as of Trinity Term, 1821, and the *teste* of the writ of seisin bore date on the 11th of July, 1821.

In the meantime the purchaser brought an action to recover back his deposit ; and, on the 6th of July, the bill was filed by the vendor.

Mr. Sugden and *Mr. Treslove*, in support of the exception :

Till the recovery was suffered, the vendor had not a good title ; that recovery could not have been completed *before the 11th of July, and was not shewn to have been completed till the 14th of July. * * If Lord Bridgewater had died before the completion of the recovery, the defect would not have been cured by his signature to these instruments, and the title would still have been a bad one.

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The consequence is, that the plaintiff ought to bear the costs of

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the suit, or at least of some part of it; since, at the time of filing the bill, he had no right to the relief he sought, and the defendant was at that time justified in resisting the performance of the contract.

Mr. Horne and Mr. Barber, for the plaintiff: [cited *Braybrooke v. Inskip*.†]

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At all events the defendant never had any ground for resisting the performance of his contract for the purchase of lot 2; and his resistance as to lot 1, after the recovery was completed, was altogether unreasonable.

Mr. Sugden, in reply. * * *

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It has been attempted to sustain the Master's report *with respect to the time when a good title was shewn to lot 1, on the principle sanctioned by Lord ELDON in *Lord Braybrooke v. Inskip*,‡ “As to the question when the abstract was complete, the abstract is complete whenever it appears that, upon certain acts done, the legal and equitable estates will be in the purchaser. That may be long before the title can be completed.” But in this case the title, on the 25th of June, 1821, was not outstanding in any persons who were trustees for the vendor, or whom the vendor had any means of compelling to concur in making a tenant to the *præcipe*, and in suffering a recovery. There was an independent title in Lord Bridgewater; and though he might think himself bound in honour to execute such an instrument as the plaintiff might require, that circumstance could not cure the defect. The case would have been different, if the estate had been in a person, who, being a trustee for the plaintiffs, was under an obligation, capable of being enforced in a court of justice, to execute such a deed as his *cestui que trust* might require. For, as Lord ELDON held in the case cited, where acts are to be done which the party can cause to be done, the abstract is complete, and a good title is shewn, though the acts are not done, and are only in progress towards being done.

† 7 R. R. 106 (8 Ves. 417).

‡ 7 R. R. at p. 109 (8 Ves. 436).

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But here the title itself was out of the vendor, and, on the 25th of June, 1821, was in Lord Bridgewater. The deed making the tenant to the *præcipe* was not executed; and, even if it had been executed, the recovery was not suffered. It is not enough that Lord Bridgewater had, before the bill was filed, executed the deed of release, and signed a warrant of attorney for suffering a recovery. He might have died before the return of the writ of summons; in which case the recovery would not have been good. My opinion is, that a good title was not shewn until the 14th of July, when it was shewn that *the recovery had been completed. The finding of the Master is therefore incorrect.

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What effect ought this to have on the costs of the suit, so far as they relate to lot 1? The general rule is, that if a good title has not been shewn at the commencement of a suit by a vendor, costs are allowed to the purchaser up to the time when a good title is shewn, and against him afterwards. The defendant, therefore, must have the costs up to the 14th of July, 1821, of so much of the suit as relates to this lot, and he must pay the subsequent costs.

This was a contract for the purchase of two lots. A good title to the other lot was shewn before the commencement of the suit. But it was argued, that the vendor could not compel a specific performance of the contract as to either lot, unless he could shew a good title to both lots; and, therefore, that the costs of the suit, so far as they relate to lot 2, ought to be affected by the circumstance, that a good title to lot 1 was not shewn till eight days after the filing of the bill.

I find no such case made by the answer, nor any evidence to support it. If a person becomes the purchaser of two lots, the purchase may unquestionably be enforced against him as to one of the lots, and not as to the other. In *Poole v. Shergold*† there were two of the lots, to which no title could be made; and Lord KENYON says, “I am clearly of opinion that a case might be made, where, if it turned out that the seller could not make a good title to a part, it might be a sufficient reason to put an end to the whole contract. . . . But in the present case I am bound to suppose, that the lots, to which no title can be made, are not of

† 1 R. R. at p. 38 (1 Cox, 274).

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sufficient importance to make the loss of them a reason for *vacating the agreement as to the remainder." The rule there laid down has been considered in later cases as the law of the Court. The plaintiff is therefore entitled to the costs of the suit, so far as they relate to lot 2.



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(1 Russell, 331—347.)

A son, who, when he attained twenty-one, was a younger child, but, by the subsequent death of his elder brother, in the lifetime of his parents, becomes an eldest son before the time fixed for the payment of the younger children's portions, is entitled to his share of portions, which are directed to vest in younger sons at twenty-one, though not payable till after the death of the parents; there being enough in the settlements, by which the portions were provided, to shew, that the character of younger child was to be ascertained by reference to the time when the portions vested, and not to the time when they became payable.

By a settlement made previous to the marriage of Sir William Smyth, Bart. with Ann Windham, dated the 20th of March, 1779, Sir William Smyth, Bart. charged certain manors, lands, and hereditaments with the sum of 6,000*l.* for the portion or portions of all and every the child and children of him Sir William Smyth, by Ann Windham, his intended wife (except an eldest or only son), to be paid to such children, if more than one, in such shares or proportions, in such manner, and at such times, and subject to such provisos and limitations over, for the benefit of some or one of them (except an eldest or only son), as Sir William Smyth, by any deed or deeds, writing or writings, &c. should direct and appoint; and for want of such appointment, to be divided amongst all the children (except an eldest or only son), equally, share and share alike, and to be paid in manner therein mentioned.‡ Then followed a clause of accruer, which

† *Re Bayley's Settlement* (1870—1), L. R. 9 Eq. 491, 495; affirmed L. R. 6 Ch. 590, 592, 39 L. J. Ch. 388.

‡ The direction as to the time and manner of payment did not appear on the pleadings. The lands charged

with the 6,000*l.* were subject to a rent-charge of 1,200*l.* a year, limited to Ann Windham for life, in case she survived her intended husband, and secured by a term of years.

provided, "That, if any one or more of such child or children, being a son or sons, should *depart this life, or become an eldest or only son, and entitled in possession to the said manors, hereditaments, and premises, or to the rents and profits thereof, before attaining the age of twenty-one years, and, being a daughter or daughters, should die under that age, without having been married, then the portion and portions therein before provided for such child or children so dying or becoming an eldest or only son entitled as aforesaid, should go to the survivor and survivors, or others and other of such children (except an eldest or only son entitled as aforesaid), to be equally divided amongst them, share and share alike, and to be paid in the same manner as the original portion or portions were made payable."

The indenture of settlement then declared, that, as soon as certain sums therein mentioned should have been paid, the manors, lands, and hereditaments comprised in an existing term of 500 years, should be assigned for the residue of the term, upon trust, by the usual ways and means, for more effectually raising and paying the sum of 6,000*l.* provided for the portions of the younger children of the intended marriage; and upon further trust, (if Sir William Smyth should have an eldest or only son, and also four or more other children by Ann Windham, or if there should be no issue male of Sir William Smyth by Ann Windham, or, there being such issue male, all of them should die without issue male before any of them should attain the age of twenty-one years, and there should be three or more daughters of Sir William Smyth by Ann Windham), to levy and raise, by mortgage or sale of the manors and premises comprised in the term of 500 years, the further sum of 4,000*l.* as and for further or additional portions for the four or more other children, there being an eldest or only son, to be equally divided amongst all such last-mentioned children, share and share alike, and to be paid *at the times therein mentioned: (that is to say) the share or shares of such of them as should be a son or sons, to be paid to him or them at his or their age or respective ages of twenty-one years, Sir William Smyth and Ann Windham being both then dead; and the share or shares of such of them as should be a daughter or daughters to be paid to her or them at her or

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their age or respective ages of twenty-one years, or day or days of marriage, which should first respectively happen after the death of the survivor of them, Sir William Smyth and Ann Windham: but if any of the children last-mentioned, and for whom the sum of 4,000*l.* was thereby intended, being a son or sons, should attain his or their age or ages of twenty-one years, and, being a daughter or daughters, should attain her or their age or ages of twenty-one years, or be married, in the lifetime of Sir William Smyth and Ann Windham, or of the survivor of them, then the share and shares of such child or children, being a son or sons so attaining such age, and being a daughter or daughters so attaining such age, or being married as aforesaid, should be raised and paid within three calendar months next after the decease of the survivor of Sir William Smyth and Ann Windham, with interest for the same, from the decease of such survivor, at the rate of 4*l.* per cent.

The indenture contained, also, a proviso, that, notwithstanding the postponement of the payment of the further or additional portions till after the decease of the survivor of them, Sir William Smyth and Ann Windham, such further or additional portions should be considered as vested interests in such of the children for whom the same were thereby intended, who, being a younger son or sons, should attain the age of twenty-one years, and, being a daughter or daughters, should attain that age, or be married in the lifetime of Sir William
[*334] *Smyth and Ann Windham, or of the survivor of them.

The marriage was shortly afterwards solemnised.

By an indenture dated the 9th of May, 1781, divers manors and hereditaments were limited to the use of Lady Smyth for life; remainder to the use of trustees during her life to preserve contingent remainders; remainder to the same trustees for a term of 2,000 years; remainder to the use of the first, second, third, and other sons of Lady Smyth successively in tail male, with divers remainders over. The trusts of the term of 2,000 years were, that, in case Lady Smyth should have, by Sir William Smyth, or by any future husband with whom she should thereafter intermarry, any child or children other than and besides an eldest and only son, the trustees should, either

in the lifetime of Lady Smyth, after she should come into possession, or be entitled to the rents and profits of the premises, and with her consent testified under her hand and seal, or else not till after her decease, by demise, sale, or mortgage of the manors and other hereditaments comprised in the term of 2,000 years, or by the other ways and means therein mentioned, raise the sum of 6,000*l.* for the portion and portions of all and every the child and children of Lady Smyth lawfully begotten, or to be begotten, other than an eldest or only son, be the same a son or sons, daughter or daughters, or both sons and daughters respectively, and should pay the same 6,000*l.* unto and equally amongst all and every such child or children, be the same sons or daughters or both, not being any of them an eldest or only son, share and share alike ; the parts and shares of such of them as should be a son or sons, to be paid to him or them at his or their respective age or ages of twenty-one years ; and to such of *them as should be a daughter or daughters, at her or their respective age or ages of twenty-one years, or day or days of her or their respective marriage or marriages, which should first happen, if such respective times of payment should happen after the death of Lady Smyth ; but, if in her lifetime, then within three months next after her decease, and not sooner, unless by the express consent of Lady Smyth, signified by writing under her hand.

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It was further declared, that the portion or portions of such child or children, be the same a son or sons so attaining the age of twenty-one years, or a daughter or daughters so attaining the age of twenty-one years, or being married as aforesaid, should, from and after such age or marriage, be considered as vested interests, and transmissible to his, her, or their personal representative or representatives, in the same manner as if the payment thereof had not been postponed from the time of such sons attaining their ages of twenty-one years, and of such daughters attaining that age, or marrying, until after the death of Lady Smyth : and that the trustees should, out of the rents and profits of the hereditaments and premises, raise a discretionary sum or sums for the maintenance and education of the younger children from the decease of Lady Smyth until the

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portions should become payable, not exceeding in the whole the interest of their respective portions at 4l. per cent., to be paid to the children quarterly, the first payment to be made on such of the days of payment as should next happen after the decease of Lady Smyth.

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Another clause declared, that in case any of the children, being a son or sons, should die or become an eldest or only son before he or they should attain his or their age or ages of twenty-one years, or, being a daughter or *daughters, should die before she or they should attain the age of twenty-one years or be married, then the portion or portions of such of them so dying or becoming an eldest or only son, as the case might be, or so much thereof as should not have been raised and paid to or for him, her, or them as aforesaid, should go and accrue to and be in trust for the survivors and survivor, and others and other of the children not being an eldest or only son, and be equally divided between or amongst them, if more than one, share and share alike, and should be paid when the original portion became payable: and in case of the death of any other of the children, or if any other such younger son should become an eldest or only son, then the surviving or accruing portion or portions should be subject to such contingency of accruer or survivorship to the survivors and survivor, and others and other of the children, other than an eldest or only son for the time being, as was declared concerning the original portions, so as, in case there should be only one surviving child entitled to portions as aforesaid, such surviving child should be entitled to no more than 6,000l.

There were seven children of the marriage;—five sons, William, Thomas, Edward, John, and Joseph Smyth; and two daughters, Charlotte and Caroline. The eldest son, William, died in the lifetime of his father and mother, and after both he and his next brother Thomas had attained twenty-one. Thomas Smyth, who survived both his parents, became entitled on the death of his mother in 1815, to an estate in tail-male in the lands settled by the indenture of May, 1781, and, on the death of his father in 1823, to an estate in tail-male in the lands settled by the deed of March, 1779.

In 1816 Thomas Smyth was found a lunatic.

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The 6,000*l.* provided by the settlement of 1779 had been appointed by Sir William Smyth, so that no question arose concerning it. A sixth part of the 4,000*l.* had been paid into Court in the lunacy, without prejudice to the claim of the brothers and sisters of the lunatic; and a sixth part of the 6,000*l.* settled by the deed of 1781, being a charge on the lunatic's estate, had not been raised.

The bill was filed by Joseph Smyth and his two sisters, as three of the five persons who alone were the younger children of Sir William and Lady Smyth, at the time when the 4,000*l.* and 6,000*l.* became payable. They claimed to be entitled, each to one fifth of that one sixth of these sums, which had been left undistributed, in order to answer that share, which, having vested in the lunatic while his elder brother was alive, continued, as was alleged by the defendants, to belong to him even now that he had become the eldest son, and was in possession of the entailed estates.

The question, therefore, was, whether Sir Thomas Smyth, having been a younger son when he attained twenty-one, but having become an eldest son and succeeded to the entailed estates before the time of paying the 4,000*l.* and 6,000*l.* arrived, was entitled to share as one of the younger children in these sums; or whether they were to be distributed between the three sons and the two daughters, who, at the death of the survivor of Sir William and Lady Smyth, were the only younger children?

Mr. Shadwell and *Mr. Lynch*, for the plaintiffs:

Those only can take as younger children, who answered that description when the portions became payable. [They cited *Chadwick v. Doleman*,† *Teynham v. Webb*,‡ *Matthews v. Paul*,§ and other cases not noticed in the judgment.] [338]

Mr. Sugden and *Mr. Sharpe*, for Sir Thomas Smyth: [339]

The present case is different from all the authorities which have been cited; for in none of them is there an express direction

† 2 Vern. 528.

§ 19 B. R. 207 (3 Swanst. 328).

‡ 2 Ves. Sen. 198.

WINDHAM that the portions shall vest at a given time; but here, the
 v. GRAHAM. interests both in the 4,000*l.* and in the 6,000*l.* are declared to
 vest in younger sons on attaining twenty-one, though the payment
 is postponed till the death of the parents. * * *

Loder v. Loder,† *Graham v. Lord Londonderry*,‡ and *Driver v. Frank*,§ were cited.

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[*340] The question is, whether Thomas, having attained the age of twenty-one years in the lifetime of his eldest brother, William, and having, by the death of that brother in *the lifetime of Sir William Smyth and Lady Smyth, become an eldest son, is entitled to a distributive share, either of the 4,000*l.* directed to be raised by the settlement of 1779, or of the 6,000*l.* which was provided by the deed of 1781.

For the plaintiffs, *Chadwick v. Doleman*|| has been relied on; and the general rule, deducible from that authority, has been stated to be this:—that, where provision is made for younger children, to the exclusion of the eldest son, a younger child, who, before the time when payment is directed to be made, becomes an eldest son, is held not to fill the character of a younger son within the intent of the provision, and is therefore excluded from participating in it.

On the other hand it was contended on behalf of the defendant, Sir Thomas Smyth, that the time to which we must look, in order to determine who are entitled to participate in the 4,000*l.* and 6,000*l.*, is the time when, according to the deeds, the shares were to vest; that it is expressly provided, that they should vest at twenty-one; and that, being once vested, they were not to be divested subsequently. To this it was replied, that in *Matthews v. Paul*, though there a younger son became an eldest son before he attained twenty-one, Sir THOMAS PLUMER was of opinion, that even “if the shares had vested, the vesting would have been *sub modo* only, subject to be divested, and under the condition of not becoming an eldest son.”

† 2 Ves. Sen. 530.

‡ 2 Ves. Sen. 199.

§ 15 R. R. 385 (8 Taunt. 468; 6

Price, 41; 3 M. & S. 25).

|| 2 Vern. 528.

It is now settled, that, ordinarily speaking, where provisions are made for younger children to the exclusion of an eldest son, and a younger son becomes an elder *son before the time of vesting, or, according to the language used in some of the authorities, before the time of distribution, such younger son is to be excluded.

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But if the provisions of this settlement shew that the shares of the children were to be vested interests at twenty-one, and were to remain so, whatever might *occur afterwards, it will follow, that, in the events which have happened, Thomas was not excluded from participating in the sums of 4,000*l.* and 6,000*l.*

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Though no question arises upon the 6,000*l.* provided for the children of the marriage by the indenture of 1779, it is important to refer to the clauses which direct how that sum is to go, that we may see how far they affect or illustrate the limitation of the additional provision of 4,000*l.* That sum of 6,000*l.* is settled on the younger children, to be a vested interest in such of them as are sons when they attain twenty-one; † and then follows a proviso, “that if any one or more of such child or children, being a son or sons, should depart this life, or become an eldest or only son, and entitled in possession to the manors, hereditaments, and premises, or to the rents and profits thereof, before attaining the age of twenty-one years; and being a daughter or daughters, shall die under that age without having been married, then the portion and portions thereinbefore provided for such child or children so dying or becoming an eldest or only son entitled as aforesaid, should go to the survivors and survivor, or others and other of such children, (except an eldest or only son, entitled as aforesaid,) to be equally divided amongst them, share and share alike.”

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So that here is an express proviso, that, if a younger son should during his minority become an eldest son, he is in that case to lose his share of the provision. As the parties have specially provided that such a younger son is to be excluded in that particular case, is it not to be inferred that it was only the

† The clause of the deed, which directed the shares to vest at twenty-one, did not appear on the pleadings.

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event of his so becoming an eldest son that was to exclude him? Generally speaking, to mention one state of things as affording the case in which a particular rule is to apply, will prevent it from being extended to a different state of things. From the first part, therefore, of the deed of 1779, there arises a strong inference that attaining *the age of twenty-one years was the period at which the character of younger sons, with reference to this provision, was to be finally determined.

Then what are the dispositions which are made with respect to the 4,000*l.*? There is an express declaration that the 4,000*l.* is to be raised as "further and additional portions" for the younger children; that is, portions additional to those which had been previously directed to be raised, and to accrue in the same manner as those other portions were to accrue. It is also declared, that the portions of the younger children, with respect to this 4,000*l.*, should be paid to them at twenty-one, if sons, and at twenty-one, or marriage, if daughters, provided Sir William Smyth and Lady Smyth were then dead; but if the younger children attained that age, or, being daughters, married during the life of Sir William Smyth and Lady Smyth, the payment was to be made within three months after the decease of the survivor of the parents. And there is added an express proviso, that, "notwithstanding the postponement of the payment of the further or additional portions till after the decease of the survivors of them Sir William Smyth and Ann Windham, such further and additional portions should be considered as vested interests in such of the children for whom the same were thereby intended, who, being a younger son or sons, should attain the age of twenty-one years, and, being a daughter or daughters, should attain that age, or be married in the lifetime of Sir William Smyth and Ann Windham, or the survivor of them." The meaning of this clause was, that, although the time of payment was postponed till after the decease of the parents, that circumstance was to make no difference in the rights of the children to the fund, and that the shares of younger sons, who attained twenty-one, were to be considered as vested in them when they attained that age, notwithstanding that the money was not to be paid to them while either parent was alive.

*When Thomas attained twenty-one, he was a younger son. If his share had then been paid to him, his right to it could not have been affected by any subsequent event. Can that right be varied by the postponement of the time of payment?

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Suppose that Thomas, having attained twenty-one, had died in the lifetime of his parents. Could it have been contended that his share of the 4,000*l.* would not have been a vested interest, so as to be transmissible to his personal representatives? Yet, to that length the argument of the plaintiffs must be carried. In that state of things, Thomas, though he never in effect became an eldest son, would have been excluded, and Edward, having subsequently become an eldest son, would have been excluded too.

Therefore, looking at the peculiar construction of this settlement, and considering the limitation of this 4,000*l.* in connection with the previous settlement of the 6,000*l.*, in which there is an express stipulation for the accruer to the other younger children of the share of a younger son, who, before he attains twenty-one, becomes an eldest son (thus excluding, as it seems to me, accruer in the other event,—that of his becoming an eldest son after he attains twenty-one), my opinion is, that the plaintiffs are not entitled to that portion of the 4,000*l.* which they claim in this suit.

On the other settlement the case is much stronger against the plaintiffs: for the deed of 1781 contains, with respect to the 6,000*l.*, which it directs to be raised, both an express stipulation that the shares shall become vested in younger sons at twenty-one, in the same manner as if the time of payment had not been postponed, and an express proviso for the accruer of the share of a younger son, who, during his minority, shall become an *eldest son. Thus the instrument itself defines the period at which the character of an eldest son is to be ascertained.

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Driver v. Frank does not conclude this case. Neither do I rely on the case of *Graham v. Lord Londonderry*; because, from the judgment in *Teynham v. Webb*, it appears that Lord HARDWICKE did not conceive himself to have decided the question which is raised here. Founding myself on the particular provisions of this settlement, which shew to what time we are to look

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in order to ascertain the character of eldest son, my opinion is, that Sir Thomas Smyth is entitled to his share of the 4,000*l.* and the 6,000*l.*

The bill must be dismissed.

Mr. Lynch submitted, that, as the question was one of great nicety, the plaintiffs, though unsuccessful, ought to have their costs out of the fund; and cited the observation of the LORD CHANCELLOR in *Lynn v. Beaver*,† as an authority.

No opposition was made to this application.

Lord GIFFORD, expressing an inclination to give the costs out of the lunatic's fund, if there were authority to justify him in doing so where the bill was dismissed, reserved that point for further consideration, but died without having determined it.

The cause was subsequently mentioned to Sir JOHN S. COPLEY, M.R. who, on the authority of *Lynn v. Beaver*, directed the costs of all parties to be paid out of the fund.

1826.

March 9.
July 6.

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MAY v. BENNETT.†

(1 Russell, 370—374.)

A testator having directed his executors to lay out in what Government security they pleased, as much money as would produce a certain annual interest, and having given that annual interest to his wife during her life, in case she did not marry again, the executors invested in the 5 per cents. a sum which yielded dividends exactly equal to the specified income; those dividends being afterwards diminished by the conversion of the 5 per cents. into 4 per cents.: Held that the widow was entitled to have the deficiency made good, either by the sale from time to time of portions of the appropriated stock, or out of any other part of the residue which could be made available.

JOSEPH MAY, by his will, dated the 8th of Feb. 1804, appointed William May and Michael Leeming his executors, and gave to them all his property, real and personal, “in trust, to dispose of in the following manner: after all his just and lawful debts were

† 1 Turner, 68.

Cas. 588, 49 L. J. Ch. 829.

† *Carmichael v. Gee* (1880) 5 App.

discharged, first he ordered his executors to lay out, in their own names, and in what Government security they pleased, as much money arising from his estate as would produce the annual interest of 54*l.* 12*s.* per year, for the sole use of his wife, to commence from the time of his decease, which interest of 54*l.* 12*s.* per year his said wife should have during her life, if she did not marry; but in case she married, then that the 54*l.* 12*s.* per year should cease being paid her at such marriage, and he ordered his executors to sell out so much of the said stock in trust as would produce 300*l.*, and to pay it to his wife on her marriage: and the remainder of the stock, that was put into trust for the produce of the 54*l.* 12*s.* a year, was to become a part of the residue of his estate, in like manner as if she did not marry." The testator, after giving some legacies, bequeathed the residue of his estate to William May.

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In 1804, shortly after the death of the testator, the executors, for the purpose of answering the bequest to his widow, invested a part of his assets in the purchase of 1,092*l.* Navy 5 per cent. Annuities, yielding an *annual income of 54*l.* 12*s.* The stock stood in their names; they received the dividends, and paid to Mrs. May the annual sum of 54*l.* 12*s.* In 1822, when the 5 per cent. stock was reduced, Leeming, the surviving trustee and executor, did not signify his dissent; and the 1,092*l.* was converted into 1,146*l.* 12*s.* New 4 per cent. Bank Annuities, which produced only 45*l.* 12*s.* a year. It did not clearly appear whether there had been any residue, exclusive of the sum thus set apart to answer the provision for the widow; but such residue, if there were any, had been long since paid over to William May, the residuary legatee, who died in 1810.

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The bill was filed by the widow against the personal representatives of the testator and of the residuary legatee. It prayed that the past and future deficiency of the dividends of the stock to answer the yearly payment of 54*l.* 12*s.* might be made good either out of the general estate of the testator, or by the sale, from time to time, of a competent portion of the stock.

Mr. Sugden and Mr. Sidebottom for the plaintiff:

* * In substance this is the gift of an annuity; and [372]

MAY the direction for investment only points out the mode of
 v. securing it.
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Mr. Roupell for one of the defendants. * * *

[373] THE MASTER OF THE ROLLS :

The real question here is, whether the bequest in favour of Mrs. May is to be considered as the bequest of an annuity, or as the bequest of the income of a sum of money, which is directed to be set apart.

July 6. THE MASTER OF THE ROLLS :

This bill is filed on the ground that it was the testator's intention to secure to his widow a yearly sum of 54*l.* 12*s.* during her life, in case she did not marry again, and not merely to cause as much money to be set apart as, at the moment of appropriation, would produce 54*l.* 12*s.*; and I am of opinion that the construction which she contends for, is the sound one. The will shews that it was the wish of the testator to secure to her a yearly income of 54*l.* 12*s.*, and, though the executors invested in the 5 per cents. a sum sufficient to yield 54*l.* 12*s.* of yearly dividends, she is not to be prejudiced by the conversion of that species of stock, but is entitled to claim the difference between the present dividends and the yearly sum of 54*l.* 12*s.*, given to her by the will.

If there is any difficulty in making good the difference out of the general estate of the testator, she must have the deficiency raised, from time to time, by the sale of parts of the appropriated stock.

* * * * *

COSLAKE *v.* TILL.†

(1 Russell, 376—380.)

In an agreement by a tenant at will of a public-house for the sale of the possession, trade, and good-will of the house at a fixed sum, and of the stock and furniture at a valuation, one of the terms being that possession should be taken, and the money paid on a given day, time is of the essence of the contract; and a purchaser, who was not in a condition to fulfil his part of the contract on that day, cannot compel a specific performance, though he was ready on the following day to have proceeded to complete the purchase.

THE defendant Till was the occupier of a public-house called the Plumbers' Arms, which he held as tenant at will under Messrs. Elliott & Co., brewers. By a memorandum of agreement dated the 5th of March, 1824, he contracted to sell and assign to the plaintiff Coslake for 105*l.* the possession, trade, and good-will of that public-house; to sell to him also the household furniture and tenant's fixtures at an appraisement not exceeding 250*l.*, to be made by two appraisers or their umpire, and the stock of porter, ale, and spirituous liquors, not exceeding specified quantities or values, at the sum which should be fixed by two licensed gaugers or their umpire; to transfer to him the beer and other licenses on being paid for the time which they should have still to run; and to give him possession of the premises on or before the 26th of March then next. Coslake on his part agreed to accept of these conditions; to pay for the possession, trade, and good-will the sum of 105*l.* on the licenses being assigned to him; and to pay the sum at which the goods, fixtures, licenses, and stock should be valued, and to take possession of the house and premises, on the day and time before mentioned. A deposit of 30*l.* was paid by Coslake.

The bill was filed by Coslake for a specific performance of this agreement.

It was resisted by the vendor on the ground, that the purchaser was not ready to perform his part of the contract *at the stipulated time, by having the valuation completed on his behalf, and by taking possession and paying the purchase money.

The evidence for the defendant proved, that, shortly before the

† *Cp. Day v. Luhke* (1868) L. R. 5 *Gale* (1871) L. R. 7 Ch. 12, 41 L. J. Eq. 336, 37 L. J. Ch. 330; *Cowles v.* Ch. 14.

1826.
March 13.
Aug. 4.

Rolls Court.
Lord
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26th of March, Coslake made application to Till to receive his bill of exchange, instead of cash, in part payment of the sum which he should have to pay; that Till refused to accede to such a proposal, insisting on the strict performance of the contract; that Barton, the appraiser selected by Till, made an inventory of the furniture and fixtures, and sent a copy of it to Walker, who was Coslake's appraiser, on the 25th of March, before twelve o'clock at noon; that, on the 26th of March, a person attended on the premises on behalf of Till, from nine in the morning till twelve at night, in order that a valuation might be made, and the contract completed; that the plaintiff did not attend, nor any one on his behalf; but that Walker sent to Barton a note, stating that he was unable to meet him on the following day, but would attend for the purpose of completing the valuation on the 27th of March.

The plaintiff, on the other hand, insisted, that time was not of the essence of the contract; that, although Walker, his appraiser, was not ready to proceed with the valuation on the 26th of March, yet Till, by omitting to send the inventory till the day immediately preceding, had not given Walker a reasonably early notice, and had himself therefore caused or been accessory to the delay; and, that Walker would have been ready to have proceeded with the valuation on the day following the 26th of March, or shortly afterwards.

[*378] It was admitted in the answer, that, on the 27th of March, Walker attended at the premises for the purpose *of making the appraisement, and that the defendant refused to permit him to make it, because the day for the completion of the purchase was past.

Mr. Sugden and Mr. Combe for the plaintiff.

Mr. Shadwell and Mr. W. Kaye for the defendant.

THE MASTER OF THE ROLLS :

The substantial subject-matter of this contract was the goodwill of the trade carried on in this public-house. In *Baxter v. Conolly*,† the LORD CHANCELLOR appears to have been of

† 1 J. & W. 576, 580.

opinion that a contract for the sale of a good-will could not be enforced in equity. "The Court certainly will not execute a contract for the sale of a good-will; at the same time it will not enjoin against any proceedings at law under such an agreement. Suppose, for instance, there is a contract for the good-will of a shop; it cannot be conveyed, and the Court would say, go and make what you can of it at law; if you can recover, very well, we will not prevent you; if you cannot, very well again, we will not assist." Here the contract may be represented as having been for something more than a mere good-will: the possession of the house was to be delivered; but nothing more than possession could be given, for Till had no interest in the house, except under a parol demise. The agreement was, that possession should be delivered on the 26th of March, and the principal consideration is, whether time was not a material ingredient in the contract.

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Till occupied the house as tenant to Messrs. Elliott & Co., without having any definite interest in it: *and therefore it was important to him that possession should be taken by the succeeding occupier on the very day which had been fixed; for, if Till retained possession after that day, he might have become tenant for the succeeding year, and have incurred fresh liabilities.

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The stock, too, was to be taken on the 26th of March, and that stock was of a fluctuating kind. The quantities of ale, beer, and spirituous liquors would probably not be the same on the 27th of March, as they were on the preceding day. Where the subject-matter, which is to be bought and sold, is, in its very nature, exposed to daily variation, time must necessarily form a very material ingredient in the contract.

The 26th of March was the latest time, at which, according to the stipulations of this contract, possession was to have been delivered and the money paid. On the preceding day, Till had sent an inventory to Walker, who was Coslake's appraiser; and as it related to the articles, which were to be transferred on the 26th, it could not be expected that it should be made long before the time appointed for the change of possession. On the 26th, Till was ready to have delivered up the premises and stock, and to have received the amount of the valuation; but no step was

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taken by Coslake, or on his behalf: and this is the more worthy of notice, because, when Coslake, a few days before, applied to the vendor to receive bills in part payment of the purchase, Till, on refusing to do so, had intimated, that he expected the contract to be performed literally. The only thing done on the part of Coslake on the 26th of March, was, that Walker sent a note, stating that he had received the inventory at a late hour on the preceding day, and that, having other business which required his presence, he could not attend at the appointed time, but that he would *be ready to proceed with the valuation on the following day. The defendant, however, does not choose to be so dealt with. He says—"Inasmuch as I shall incur fresh liabilities by retaining the premises; as the stock will in the mean time vary; as I cannot shut up this house and suspend this trade for a day or two, the value of it as a public-house depending on its being kept regularly open: I shall, therefore, no longer consider myself as bound by this contract."

Independently of the question, whether the Court would enforce performance of a contract for a subject-matter, of which a good-will forms so principal a part, I consider that time was a material ingredient in this contract; and, therefore, the

Bill must be dismissed with costs.

BANKES v. HOLME.

(1 Russell, 394, n.—401, n.)

1826.

*In the
House of
Lords.*

[394, n.]

By a marriage settlement, lands are settled on the first and other sons of the marriage successively in tail-male; remainder to the daughters of the marriage as tenants in common in tail general, with cross remainders† between them, and the ultimate reversion in fee is limited to the husband, who afterwards, by a will reciting, that he was seised of the reversion in fee-simple, expectant upon the contingency of there being no child of the marriage, or of the death of all the children of the marriage without issue, devises his said reversion in case he should die without any child or children, or, there being such, all of them should die without issue: Held, that the devise of the reversion is void.

THE following statement of *Bankes v. Holme* has been abridged from the printed cases of the appellant and the respondents.

Upon the marriage of Ridgeway Owen Meyrick with Diana Wynne, a settlement was made, by indentures of lease and release, bearing date respectively on the 13th and 14th of March, 1771, [by which] Ridgeway Owen Meyrick did grant, bargain, sell, release, and confirm unto Gostlin and Blunt, and to their heirs, *(among other lands and hereditaments,) the remainder and reversion in fee simple of him Ridgeway Owen Meyrick, expectant upon and to take effect in possession immediately after the decease of Frances Countess Dowager of Londonderry, of and in the manors or reputed manors of Cudworth, Nether-Cudworth, and Over-Cudworth, in the county of York, and of and in certain lands and hereditaments, situate in those manors, or in other specified places in the county of York; to hold the same unto Gostlin and Blunt, their heirs and assigns, to the use of Ridgeway Owen Meyrick, and his heirs, until the intended marriage; and immediately after the solemnization thereof, to the use of Ridgeway Owen Meyrick and his assigns, for his life, without impeachment of waste; remainder to the use of Gostlin and Blunt, and their heirs, during Ridgeway Owen Meyrick's life, on trust to preserve contingent remainders; remainder to the use of Robert Wynne, of Mold, and Robert Wynne, of Garthewin, their executors, administrators, and assigns, for the term of ninety-

[*395, n.]

† See the next case.

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[*396, n.]

nine years, without impeachment of waste, upon trust to raise monies to pay the fine and fees of the renewal of the lease of certain leasehold premises, and an annual provision for the eldest son of the intended marriage during his minority; from and after the expiration, or other determination of the term of ninety-nine years, and subject thereto, to the use of Owen Holland and Richard Meyrick, their executors, administrators, and assigns, for a term of eight hundred years, without impeachment of waste, upon trusts which were for raising portions for the younger children of the intended marriage; from and after the expiration, or other determination of the term of eight hundred years, and subject thereto, to the use of Diana Wynne, and her assigns, for her life, as and for part of her jointure, and in bar of dower, or of any free bench, or widow's estate which she might claim; remainder *to the use of Gostlin and Blunt, and their heirs, during her life, on trust to preserve contingent remainders; remainder to the use of the first and other sons of the body of Ridgeway Owen Meyrick, on the body of Diana Wynne lawfully begotten, successively in tail-male; remainder to the use of all and every the daughter and daughters of the body of Ridgeway Owen Meyrick on the body of Diana Wynne to be begotten, equally to be divided between them, share and share alike, as tenants in common in tail, with cross-remainders in tail between them; remainder to the use of Ridgeway Owen Meyrick, his heirs and assigns for ever.

The marriage was solemnized; and, shortly afterwards, the Countess Dowager of Londonderry died.

Owen Meyrick by his last will, which, though purporting to bear date on the 16th day of February, 1770, was in fact executed by him on or about the 16th day of February, 1778, devised in the following words: "Whereas by indentures of lease and release, bearing date respectively the 13th and 14th days of March, 1771, made previous to, and in consideration of my marriage with Diana, my dear and much esteemed wife, I am seised of, or entitled to, the reversion in fee-simple, expectant upon, and to take effect in possession immediately after the decease of my said dear wife, in case and upon the contingency that there shall be no child or children of my said dear wife by

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me begotten, or, there being such, all of them shall happen to depart this life without issue, of and in divers freehold manors, messuages, lands, tenements, and hereditaments in Cudworth and elsewhere, in the county of York; and am possessed of, or entitled to the reversion or remainder expectant and to take effect as aforesaid, of and in the leasehold rectory of Royston, and the tithes and hereditaments thereto belonging, situate and being in the said county of York, for and during the estate, term, and interest *therein now to come and unexpired, under a lease from [*397, n.] his Grace the Archbishop of York; and am possessed of, or entitled to the like reversion or remainder expectant as aforesaid, of two messuages, and about seventy acres of land in Cudworth aforesaid, held by lease from the Crown; formerly part of the possessions of the dissolved hospital of the Savoy; and I am also seised of, or entitled unto the reversion or remainder, in fee-simple, expectant upon and to take effect in possession immediately after the several deceases of my honoured mother, Lady Lucy Meyrick, and my said dear wife, and of the survivors of them, in the case and upon the contingency aforesaid, of and in certain manors, messuages, lands, tenements, tithes, and hereditaments, situate, lying, and being in the several counties of Dorset, Devon, and Wilts: Now, in case I should die without leaving any children or child, or, there being such, all of them shall happen to depart this life without issue lawfully begotten; then, I do hereby give, devise, and bequeath the aforesaid reversion of and in the said freehold, hereditaments and premises in the county of York, unto my uncle Richard Meyrick, and my friend William Michael Lally, and the survivor of them, his executors and administrators for and during, and unto the full end and term of four hundred years, upon trust, that my said trustees, and the survivor of them, his executors and administrators, do and shall, by mortgage or sale of all or any part of the premises comprised in the said term, or out of the rents and profits thereof, raise and levy the sum of 5,000*l*." After declaring the trusts of this sum, which in the events that happened were in favour of the younger children of Thomas Holme and Mary his wife, and charging the contingent reversion of the freehold premises in Yorkshire with an annuity to his sister Ann Elizabeth

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 [*398, n.]

Meyrick during his mother's life, and another annuity *to a cousin, the testator devised that reversion to his sister Ann Elizabeth Meyrick for life; remainder after her decease to certain uses for her issue, but subjecting it, in case she should not have any child who attained twenty-one, to a charge of 1,000*l.*; remainder to Richard Meyrick for life; remainder to Mary Holme for life; remainder to Thomas Holme for life; remainder to the use of Bankes and Blunt, their executors, administrators, and assigns, for the term of one thousand two hundred years, upon trust, to raise 8,000*l.* for the younger children of Thomas Holme and Mary his wife; and, subject to that term, he gave and devised the freehold estate, in the county of York, unto and to the use of the first son of the body of Thomas Holme, on Mary his wife begotten and to be begotten, and to the heirs male of the body of such first son, lawfully issuing, with other remainders over.

Ridgeway Owen Meyrick died on the 26th of April, 1773, leaving an infant son, his only child, who died shortly afterwards without issue.

Lady Lucy Meyrick, Richard Meyrick, Mary Holme, and Thomas Holme, died in the lifetime of Diana, the testator's widow. She died in August, 1805. Upon her death, Ann Elizabeth Meyrick, the sister of the testator and heiress-at-law both of him and of his infant son, entered into possession of the Yorkshire estates; and, by indentures of lease and release, bearing date respectively on the 21st and 22nd of December, 1807, reciting that she was seised of an absolute estate of inheritance in fee-simple, in possession, in those premises, she, in consideration of natural love and affection, conveyed them to trustees, upon certain uses and trusts, under which, subject to the payment of 13,000*l.* to the younger children of Thomas Holme and Mary his wife, and various other charges, Meyrick Bankes (the eldest son of Thomas Holme and Mary *his wife), took an estate for life. Ann Elizabeth Meyrick died on the 23rd of July, 1816, without having ever been married.

In August, 1818, a bill was filed by the younger children of Mr. and Mrs. Holme, against the different persons who claimed interests, either under the will of Ridgeway Owen Meyrick, or under the conveyance by Ann Elizabeth Meyrick, praying that

the will might be established, and its trusts carried into execution, and that the sums of 5,000*l.* and 8,000*l.* might be raised by sale or mortgage of the estates in the county of York, for the respective terms of four hundred years, and one thousand two hundred years; or if the Court should be of opinion that the will was void, so far as it regarded the freehold estates in Yorkshire, and that the indentures of December, 1807, were valid, then that the sum of 13,000*l.* might be raised out of those estates, and paid to the plaintiffs.

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HOLME.

Meyrick Bankes, by his answer, insisted, that the devise of the lands and tenements in Yorkshire was valid, and that, by virtue thereof, he was tenant in tail of those estates, subject to the charges created by the will.

Such of the defendants as claimed under the conveyance of December, 1807, insisted, that the will of Richard Owen Meyrick, so far as it purported to devise or charge the reversion of the freehold estates in Yorkshire, was void, and that, upon the death of his widow, Ann Elizabeth Meyrick became entitled absolutely, in fee-simple in possession, to those premises.

By a decree made on the 21st of May, 1821, the VICE-CHANCELLOR declared, that, according to the true construction of the will of Ridgeway Owen Meyrick, the devise of the reversion of the manors, messuages, lands, and hereditaments in the county of York, to Richard Meyrick and William Michael *Lalley, for the term of four hundred years, and the subsequent uses therein expressed, were too remote, and void, as being limited to take effect after a general failure of issue; and that the plaintiffs were not entitled to the legacies of 5,000*l.* and 8,000*l.* under the will of the testator; but that the plaintiffs and the defendants Thomas Cholmondley, &c. were, under and by virtue of the indenture of the 22nd day of December, 1807, in the pleadings mentioned, entitled to the several sums of 13,000*l.*, 5,000*l.*, 5,000*l.*, 2,000*l.*, and 5,000*l.*, and to have the same raised out of the said estate accordingly. [*400, n.]

From this decree Meyrick Bankes appealed.

The reasons of appeal (signed by *Mr. Sugden* and *Mr. Preston*,) were the following:

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First, because the testator expressly recites his title under the settlement of 1771; and he manifestly intended to devise the reversion in fee, to which he was entitled under the settlement, subject only to the previous estates created by the said settlement.

Second, because the law favours the vesting of estates, and never will, by mere construction, treat that gift to be void, which may, by another interpretation, consistent with the intention, be valid; and the construction for which the respondents contend, violates each of these rules of exposition.

Third, because, if the testator should be held to have contemplated the contingency of his having issue, which were not provided for by the settlement, yet, on the true construction of his will, the devises were to take effect immediately after the decease of his wife, in case there should, at that time, be a failure of all his issue; and as that event happened, the devises in the will took effect. This construction would, in every event, effectuate the testator's intention.

[*401, n.] The reasons in support of the decree (signed by *Mr. Wetherell* and *Mr. Shadwell*,) were the following:

Because, if the devises in question were valid in law, they must take effect either as immediate devises of the testator's reversion, or as executory devises.

But as immediate devises of the reversion, they cannot take effect; since they are not limited to take effect, till after the failure of the whole of the testator's issue, or at least of his whole issue by his then wife, some of which issue, that is to say, the daughters of his sons, and their descendants, could take no estates under the testator's marriage settlement. The devises, therefore, are not so limited as to take effect at all events immediately upon the expiration of the particular estates limited by the settlement; nor can any limitations be implied in favour of the testator's issue by his then wife, unprovided for by the settlement, since it appears from the recital of the settlement contained in the will, that the testator conceived that all his issue by his then wife were provided for by the settlement; and he, therefore, cannot be taken to have intended to have provided for any of such issue out of the settled estates by his will.

And, as executory devises, the devises in question cannot take effect; because they are limited to take effect after a general failure of the testator's issue, or at least his issue by his then wife, and are therefore void in law as being too remote. The testator, according to the plain construction of his will, does not profess to devise, nor is it in the least probable that he could have intended to devise his estates in the county of York, to his collateral kinsmen, in exclusion of any of his own issue; and, therefore, it must be understood, according to the literal language of the will, that the devisees were not to take, until failure of all the testator's issue by his then wife, or any future wife, (or at least all his issue by his then wife,) as well those provided for, as those unprovided for, by the settlement.

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The decree of the Court below was affirmed.

MORSE v. LORD ORMONDE.

(1 Russell, 382—394; S. C. 4 L. J. Ch. 158.)

A testatrix devises to A. for life, remainder to A.'s first and other sons in tail male, remainder to A.'s daughters as tenants in common in tail, with cross remainders between them in tail; remainder to trustees for a term of years upon trust, to raise and pay such legacies as she had thereafter given, or should give by any codicil: and, in a subsequent part of the will, she bequeaths various legacies from and immediately after the decease, and failure of issue of A.: Held, that, "failure of issue" in the gift of the legacies must be considered "failure of such issue, as were included in the limitation of the estate," and that, therefore, the bequests were not too remote.

1826.
March 11,
21, 22.
April.
—
Lord
ELDON, L.C.
[382]

SARAH PRICE CLARK, wife of Job Hart Price Clark, having an absolute power of appointment, by will, or otherwise, over the reversion, or remainder, in fee-simple, of certain lands and hereditaments, expectant upon the determination of some life estates, and estates in tail male, made her will, or an appointment in the *nature of a will, bearing date on the 22nd of December, 1777, and executed and attested in the manner required by law and by the terms of her power in order to pass *freehold estates. By that will, she, in pursuance of her powers, devised and appointed her reversion or remainder in fee-simple

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in these lands and hereditaments, expectant on the several deceases of her son, herself, and Clement Kinnorsley without issue male, to trustees and their heirs, upon trust, to convey and settle the same to the use, that her daughter Anna Maria Catherine Clark might receive thereout, during her minority, or *until she married with the consent of her guardians, an annuity of 1,000*l.* for her maintenance; and, subject thereto, to the use of the testatrix's husband, Job Hart Price Clark, and his assigns, without impeachment of waste, during the joint lives of him and her daughter, or until her daughter should attain twenty-one, or marry with consent, which should first happen; then, to the use and intent that a moiety of the estates, in case Job Hart Price Clark should be then living, but, if he were dead, that, from and after his decease, the whole of the estates should be limited to one or more trustees, nominated by her daughter, and their heirs, during the life of her daughter, in trust to apply the rents and profits thereof, for her daughter's separate use; and as to the other moiety of the estates, from and after the marriage of her daughter, or her attaining the age of twenty-one, which should first happen, to the use of Job Hart Price Clark, and his assigns for his life, without impeachment of waste: "with remainder," continued the testatrix, "after the death of my said daughter, as to one moiety of all the said estates, in case her father shall be then living, but, if then dead, and from and after his death, then as to the whole thereof, to the use of the first and other son and sons of my said daughter successively in tail-male, with remainder; in default of such issue, to all and every the daughter and daughters of my said daughter if more than one, as tenants in common in tail, with cross-remainders between them in tail, and with remainder to an only or only surviving daughter in tail; with remainder, in default of all such issue of my said daughter, as to one moiety, or the whole, as the event may happen, of all the aforesaid estates, to the use of one or more trustee or trustees, to be for that purpose named, their executors, administrators, and assigns, for the term of 1,000

[*386] years without impeachment of waste, *upon trust, by the usual ways and means, to raise and levy such legacies or sums of money as I have hereinafter given and bequeathed, or shall, by any codicil

or codicils hereto, hereafter give and bequeath, and pay the same to the persons respectively hereinafter or in and by such codicil or codicils named or to be named; and, as to the said moiety, or the whole, as the event may happen, of the said estates, to be comprised in the said term of 1,000 years, from and after the end, expiration, and other sooner determination thereof, and, subject in the meantime thereto, and to the trusts thereof, to the use of my said husband, the said Job Hart Price Clark, his heirs and assigns for ever." The testatrix then, after giving powers of leasing to the tenants for life, and authorising her daughter, in case she should have issue male, to charge the estate with portions for younger children, proceeded as follows :

"I give and bequeath, from and immediately after the death of my said son, Godfrey Thomas Robert Price Clark, and the said Clement Kinnersley respectively, without issue male, and the decease and failure of issue of my said daughter, Anna Maria Catherine Clark, the several legacies or sums of money hereinafter mentioned, that is to say, the sum of 20,000*l.* equally between and amongst the four younger children of the late Catherine Watson, who was sister of the late Mr. Winman Samuel, &c. the sum of 5,000*l.* to Catherine Kinnersley, sister of the said Clement Kinnersley, the sum of 5,000*l.* to Becher Morse, only son of, &c.; the sum of 3,000*l.* to Hannah Sophia Hunloke, daughter of, &c.; and the sum of 2,000*l.* to Henry Edward Hunloke. And I do hereby give and bequeath, from and immediately after my decease, unto Thomas Windsor Hunloke, William Gresley, James Houson, and William Spear, (these were the trustees to whom *she had devised her real estates) or such of them as shall survive me, the sum of 500*l.* a-piece, to be paid within three calendar months next after my death, by and out of my moiety of the surplus rents and profits of the aforesaid estates; and such other monies or personal estates as are settled upon me, or made subject to my disposition." The better to secure the payment of these legacies of 500*l.*, she, at the conclusion of her will, charged them upon the reversion of the estates which she had before devised.

She afterwards made several codicils, which only changed the

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trustees and the amount of the legacies given to them. The legacy given to Henry lapsed, by his death, in the lifetime of the testatrix.

Sarah Price Clark died in January, 1802, leaving one son and one daughter her surviving, viz. G. T. R. P. Clark, who died in 1802, under twenty-one, and without issue, and Anna Maria Catherine Price Clark, who, in 1805, intermarried with the Marquis of Ormonde, then Earl of Ormonde and Ossory.

Job Hart Price Clark died in 1811, leaving Lady Ormonde his heiress-at-law. In 1815, Clement Kinnersley died without issue; and, in 1817, Lady Ormonde died without issue. At her death, all the particular estates, acquired under the preceding wills and settlements, were spent; and, partly under deeds executed by Job Hart Price Clark, and partly under Lady Ormonde's will (but with some exceptions, and subject to some charges specified therein), Lord Ormonde became entitled to the whole of the property in fee simple.

[*388] The bill was filed by the persons, who, under the will of Sarah Price Clark, claimed the legacies of 20,000*l.* *and 5,000*l.*, to have these sums, with interest from the time of Lady Ormonde's death, raised out of the land by a sale or mortgage of the term of 1,000 years.

The persons who were interested in the lands insisted that the legacies were void, as depending on too remote a contingency; for they were not to take effect till a general failure of issue of Lady Ormonde, while the estates, previously limited in the property on which the charge was sought to be thrown, being first to her sons in tail male, and then to her daughters in tail general, included only sons and their male issue, and daughters and their issue, but did not include the daughters of sons and the issue of such daughters, or any female issue of the sons, or issue of such female issue.†

† Under deeds executed in 1809, Lady Ormonde had a power of appointing and charging the reversion of one moiety of the estates, expectant upon failure of issue of her body; and, by her will, dated the 2nd of March, 1817, and made

in pursuance of that power, she declared it to be her will and desire that the several legacies and sums of money left by her late mother, by her will, or any of the codicils thereto, should be considered as charged on all the estates generally,

The VICE-CHANCELLOR,† by a decree dated the 10th of July, 1820, declared, “that the legacy of 5,000*l.*, given and bequeathed by the will of S. P. Clark, the testatrix in the pleadings named, to the plaintiff, and the legacy of 20,000*l.* thereby given and bequeathed to the children *of Catherine Watson, in the pleadings named, and the several other legacies charged by the said will and reversion therein mentioned, are well charged upon the estates, hereditaments, and premises, comprised in the term of 1,000 years thereby created.”

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From this decree the trustees and executors under the will of Walter, Marquis of Ormonde, appealed.

Mr. Horne and *Sir George Hampson*; *Mr. Sugden* and *Mr. Roupell*; the *Solicitor-General* and *Mr. Ellison*; *Mr. Polson* and *Mr. Koe*; for parties interested in resisting the legacies:

The gift of these legacies, being after a general failure of issue of Lady Ormonde, is in itself too remote; and they cannot be supported as a charge upon the reversion of the real estates, for they are limited after an indefinite failure of a class of issue, who are not inheritable under the prior limitations. The former devises being only to the sons of Lady Ormonde in tail male, and to her daughters in tail general, female issue of sons, and the descendants of such female issue, take no estate in the lands. But the bequest is upon failure of this class of issue, as well as of those other lines of issue to whom the preceding estates tail extended: and, therefore, the rule adopted by the House of Lords in *Lady Lanesborough v. Fox* † must apply here.

Two modes of construction may be adopted by those who

and be borne by them in proportion to their respective relative value, such value, if disputed, to be ascertained and settled by her Lady Ormonde's trustees and executors. One point raised on the pleadings was, that the legacies of 20,000*l.*, 5,000*l.*, and 3,000*l.*, even though the bequest of them by Sarah Price Clark should fail as depending on too remote a contingency, became, by

reason of the clause in Lady Ormonde's will, effectually charged upon the estates. That question, however, was not discussed before the Lord Chancellor. The argument before his Lordship turned wholly on the validity of the original bequest of the legacies.

† 5 Madd. 99, 115.

‡ Cases temp. Talbot, 262.

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struggle to sustain such a bequest. They must make the charge and the prior limitations correspond; and, for that purpose, they must either extend the prior limitations beyond the expressions of the will, or accelerate *the charge, so that it may arise at an earlier period than that which the words of the testatrix, taken in their strict sense, point out. If they adopt the former of these two modes of construction, they imply estates so as to include all the issue of sons; if they have recourse to the latter, they must say, that the bequest is to take effect, not, as the will expressly directs, upon a general failure of Lady Ormonde's issue, but upon failure of male issue of her sons, and issue generally of her daughters.

[They cited *Bristow v. Boothby*,† and *Bankes v. Holme*.:]

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Mr. Hart, Mr. Heald, Mr. Shadwell, Mr. Skirrow, and Mr. Pemberton, for the legatees.]

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Mr. Sugden, in reply. * * *

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Mr. Pepys and Mr. Lynch, for other parties.

THE LORD CHANCELLOR :

I have had great difficulty in this case. I confess that I cannot reconcile the opinion I have formed with all the authorities on the subject, which are to be found in the books; nor can I reconcile those authorities with one another.

The question is, What is the meaning of the word "issue" in that part of Mrs. Clark's will, by which she gives certain legacies "from and immediately after the decease and failure of issue of my said daughter, A. M. C. Clark," afterwards Lady Ormonde?

The limitations of the estate are, "to the use of the first and other sons of Lady Ormonde, in tail male," which would carry it to all the male issue of sons, but not to the female issue of sons or their descendants; remainder "to all and every her daughters in tail as tenants in common," which would carry the property not only to daughters and their male issue, but to

† *Post*, p. 248 (2 Sim. & St. 465).

‡ *See ante*, p. 79.

daughters and their female issue. The testatrix then proceeds to create other remainders over, "in default of all such issue of my said daughter;" words which must mean such issue as are included in the prior limitations, that is, sons of Lady Ormonde and their male issue, and daughters of Lady Ormonde and their issue both male and female. Thus the *corpus* of the estate stands limited to the sons of Lady Ormonde in tail male, remainder to her daughters in tail general, remainder over.

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The event, upon which the testatrix gives the legacies, is thus stated: "I give and bequeath, from and immediately after the death of my said son, G. T. R. P. Clark, and the *said Clement Kinnersley respectively, without issue male, and the decease and failure of issue of my said daughter A. M. C. Clark." Now the words "failure of issue of my said daughter" describe an event which could not possibly take place, while there were either female issue of sons of Lady Ormonde, or male issue of their sons; or female issue of daughters of Lady Ormonde, or male issue of these daughters. But the estate is not given to female issue of sons or their descendants; and upon that ground it is contended, that the gift of the legacy is a gift after a general failure of issue, and therefore too remote.

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Undoubtedly it will be impossible to avoid this conclusion, if the words "failure of issue," in the bequest of the legacies, are to be considered as expressing a general failure of issue of Lady Ormonde. But the true question here is, whether, on the sound construction of the whole instrument taken together, these words do not mean failure of such issue as the testatrix had adverted to in the preceding limitations of the property. When I state that to be the question, I confess I feel an extreme difficulty in taking upon myself to pronounce, that the principle, on which I conceive the case must be decided, is right, and in saying, at the same time, that the principle has been fully applied in all the authorities to which my attention has been called.

On the best consideration which I can give to the subject, my opinion is, that "failure of issue of my daughter," in this will, means, not failure of issue generally, but failure of that issue to whom the estate had been previously limited. It follows, that the decision of the VICE-CHANCELLOR must be affirmed.

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 ORMONDE.
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I do not go through all the cases which have been referred to. *Bankes v. Holme*,† I admit to be a very *strong decision. There the testator, Meyrick, was seised of a reversion which he claimed under a marriage settlement. That settlement limited the lands to his first and other sons begotten on the body of his wife Diana in tail male; remainder to his daughters on the body of his said wife begotten in tail general as tenants in common, with cross remainders between them; remainder to Meyrick in fee. The reversion, therefore, which was in himself, was a reversion expectant upon limitations, which, being only two sons in tail male, with remainder to daughters in tail general, would not have carried the estate to female issue of sons. In this situation of things he made his will; and he began it by reciting what he conceived his reversion to be: "Whereas by indentures of lease and release, bearing date respectively the 13th and 14th days of March, 1771, made previous to and in consideration of my marriage with Diana, &c. I am seised of, or entitled to, the reversion in fee-simple, expectant upon, and to take effect in possession immediately after the decease of my said dear wife, in case and upon the contingency that there shall be no child or children of my said dear wife by me begotten, or there being such, all of them shall happen to depart this life without issue, of and in divers freehold messuages." Having thus described his reversion, he proceeded to devise it. "Now in case I should die without leaving any children or child, or, there being such, all of them shall happen to depart this life without issue lawfully begotten." These words describe an event that could not take place, unless his sons all died without female issue as well as without male issue, and unless his daughters died without issue, either male or female; and it is only upon that contingency that he devises his reversion. This reversion, however, was a reversion expectant, not upon a general failure of his issue, but upon estates which he had *limited to the sons of the marriage in tail male, and to the daughters in tail general. Mistaking what his reversion was, he introduces a description of it, which serves to shew what it was that he meant to dispose of, and what it was that he meant to do with that of which he could dispose. He

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† *Ante*, p. 79.

states, that what he meant to devise was that which he was not entitled to devise unless there was a failure of all issue; and he does devise it, in case of there being a failure of all issue. The House of Lords thought, that, inasmuch as he had stated in his will what the reversion was of which he thought himself entitled to dispose, and which was a reversion different from the interest which was actually in him, a court could not hold that he meant to dispose of that which was the real nature of his reversion.

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The question here seems to me to be very different. I take it to be this: whether, on the whole contents of one and the same instrument, not referring to another instrument, and misreciting the effect of it, it is not according to the true meaning of the testatrix to construe the words "failure of issue," in the passage which occasions the doubt, to be failure of such issue as were mentioned in the prior limitations? Such is, in my opinion, the true construction of the will; and I know no rule of law to prevent me from putting this construction upon it.†

Decree affirmed.

HOOD v. ASTON.

(1 Russell, 412—416.)

Injunction granted *ex parte* to restrain the negotiation of a bill of exchange by a holder, who had given valuable consideration for it, but who had notice that it had been improperly accepted by a partner of the plaintiffs, in the partnership name.

1826.
March 21.
April 7.
—
Lord
ELDON, L.C.
[412]

Hood and Haines, being partners by parole in a colliery with Aston, who had acted as accountant and cashier of the concern, filed their bill against him, charging him with various acts of misconduct, and praying, among other things, that he might be restrained from drawing, accepting, indorsing, or negotiating any note in the partnership name, and that Thomas Hill, Thomas Bate, and William Robins, might be restrained from indorsing, delivering over, or parting with a certain bill of

† The LORD CHANCELLOR did not, in his judgment, make any express allusion to, or lay any stress on, the limitation of the term of one thousand years to the trustees.

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ASTON.
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exchange *or promissory note accepted by Aston in the partnership name, which had been delivered to them in discharge of a separate debt due from him to them.

The bill and the affidavit stated, that Aston had been guilty of great misconduct as a partner, and was indebted to the firm in a large sum, which he was unable to pay;—that, in December, 1825, being indebted on his private account to Hill, Bate, and Robins, bankers, he deposited with them a bill of exchange, or promissory note, drawn or accepted by one Wallis, for his accommodation;—that, the same having become due, he, in order to take it up, gave to the bankers a promissory note or bill of exchange, dated on the 24th day of December, 1825, drawn or accepted by him in the partnership name, without the privity or consent of his co-partners;—that, at the time when the note or bill was deposited with the bankers, they, or one of them, or some of their clerks or agents, with whom that security was negotiated, were apprised, that it was drawn or accepted without the privity or consent of the co-partners;—that the bankers, knowing Aston to be in embarrassed circumstances, concerted the scheme as a mode of obtaining security for the sum which that gentleman owed them;—and that the plaintiffs did not discover the circumstances relating to the bill or note till the 7th or 8th of February, and, a few days afterwards, informed Hill, Bate, and Robins, that it had been drawn or made without their privity, and for the private purposes of Aston.

Upon this affidavit, *Mr. Wray* moved *ex parte* for an injunction, according to the prayer of the bill, against Aston and the bankers.

The VICE-CHANCELLOR granted the injunction against Aston, but refused to restrain the other defendants.

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Mr. Wray then moved before the Lord Chancellor for an injunction against Hill, Bate, and Robins.

The LORD CHANCELLOR did not think the affidavits sufficiently precise as to the circumstances which connected the bankers with the improper conduct of Aston.

In an affidavit made subsequently the plaintiffs swore, that Aston informed them, that Robins, having pressed him for payment of the separate debt which he owed to the bank, or to give some security, proposed to him to draw a bill on the partnership, and that he, Aston, agreed to the proposal, on an understanding with Robins that the bill should be binding only on his, Aston's, two-thirds of the colliery and partnership concern. The solicitor of the plaintiffs was present when Aston made these statements; and he deposed to the truth of the account which the plaintiffs gave of what was then said by Aston.

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Upon this affidavit, the motion was renewed.

THE LORD CHANCELLOR :

It is stated to me that, in this case, the injunction was refused by the VICE-CHANCELLOR, not on any insufficiency in the affidavits, but on the general ground, that the Court would not interfere to prevent the holders of a negotiable security, under such circumstances as those in which these bankers are alleged to hold the bill drawn by Aston, from using it as their property; and that the mischief which the plaintiffs may sustain from the negotiation of it, is not of the kind which this Court will avert by injunction, especially upon an *ex parte* application. I do not recollect such a doctrine to have been at any time within my experience the law of this *Court. It is true that applications for injunctions of the sort now moved for have become much more frequent than they were in former days; but the reason is that, in the present state and form of the transactions of mankind, there is an increased necessity for them; a necessity, too, which is not likely to become less.

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The mere circumstance that a partner gives a partnership bill for his separate debt may or may not lay a ground for the issuing of an injunction against its negotiation; for the person who takes it, may or may not have some reason for supposing that his debtor had a right or authority so to use the partnership name. But where it appears that an individual partner, indebted to the partnership, being unable to pay his separate bill holden by his bankers, substitutes for it, by a negotiation with them, a partnership security, made and given without the con-

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sent or knowledge of his co-partners, and the bankers are aware that it is so given without their consent or knowledge ;—that is a case which comes within the principle, upon which the Court has always been in the habit of interfering by injunction.

When this motion was first made I refused to grant the order, because the affidavit did not bring the case within the doctrine. The additional affidavit does bring it within the doctrine : the injunction therefore must go.

This bill of exchange, if it passed by negotiation into the hands of a third person, who had no notice of the circumstances under which it came into the possession of the bankers, would be as good a bill of exchange as any person could desire to have ; and from that danger, and the mischief attending it, the plaintiffs have a right to be protected.

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It is true, that, even if the Court were not to act, they would still have the security of *lis pendens*. But it is quite new doctrine to me, that a security like that, which is far from being the best that a prudent man would wish to have, is to deprive the suitor of the more effectual protection of an injunction, or that the Court, because it acts on the doctrine of *lis pendens*, will not prevent (if possible) the necessity of proceeding on such a principle.

FITZGERALD *v.* FIELD.

(1 Russell, 416—440.)

A testator directs that his household furniture, &c. and utensils in and about his mansion-house at H., should go with the mansion-house, and that, for that purpose, his trustees should make an inventory of the furniture, &c. and utensils which should be found in and about his mansion-house and premises at the time of his decease. These words do not pass farming utensils on lands at H., occupied by the testator along with the mansion-house.

A testator by his will directs, that, with the money arising from the personal estate bequeathed to his trustees (which is to be first so applied), and from the sale or mortgage of certain real estates devised to the same trustees for a term of years, the annuities and legacies thereafter given are to be paid; and he afterwards gives, among other things, an annuity secured by powers of distress and entry on the real estates: by a codicil he bequeaths his personalty and the residue of his real estates for a term of years to other trustees upon the trusts in his will and codicils mentioned: and he then gives to A. M. an annuity which he charges on the residue of his real estate, and secures by a power of distress: Held, that the personalty is the primary fund for the payment of A. M.'s annuity, and that the real estate is charged only as an auxiliary fund.

THIS was a suit for the administration of the estate of a testator, Joshua Field.

* * * * *

The testator, after bequeathing to trustees upon certain trusts all his personal estate, except his household furniture, jewels, plate, linen, china, books, prints, pictures, and such parts of his personal estate as were thereafter specifically bequeathed, proceeded in a subsequent part of his will as follows: "and my will and mind is, that my said household furniture, fixtures, linen, plate, china, pictures, and utensils, in and about my mansion-house at Heaton, shall not be sold or disposed of for any of the trusts or purposes aforesaid, but that the same shall descend and go with the said mansion-house at Heaton, so far as the law will permit the same: and, for the better preservation and ascertainment thereof, I desire my said trustees will, as soon as conveniently may be after my decease, cause an inventory to be made in writing of my said furniture, plate, china, books, pictures, fixtures, and utensils, which shall be found in and about my mansion-house and premises at the time of my death, and preserve the same for the purposes aforesaid."

1826.

May, 1825.*April*, 1826.*Rolls Court.*

Lord

GIFFORD,

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FITZGERALD The Master found, "that the testator was, at the time of his
v.
FIELD. death, possessed of certain wines, ale, and beer in his mansion-
house at Heaton, and of certain farming stock, implements, and
utensils at Heaton aforesaid."

Mr. Sugden and Mr. Beames, for John Wilmer Field, who under the limitations of the testator's will and codicils, was entitled to the enjoyment of the mansion-house, gave up all claim to the liquors and farming stock, but contended that at least the farming utensils passed by the above clause. These farming utensils, they argued, were utensils in and about the testator's mansion-house and premises, since they were utensils on the farm, which was in the testator's own occupation, along with the mansion-house.

[428] The MASTER OF THE ROLLS was of opinion, that the clause could not be construed so as to comprehend the farming utensils.

May 9.

The testator, by his will, bequeathed all his personal estate (with some exceptions) to trustees, and devised to the same trustees his freehold estates for a term of one thousand years upon trust, with the money arising from his personal estate (which he directed to be first so applied) and, in aid thereof, by sale or mortgage of a part of the premises comprised in the term of a thousand years, to pay his annuities and legacies therein-after bequeathed. In a subsequent clause he gave to one of his sons an annuity or rent-charge of 500*l.* a year, with powers of distress and entry. By a first codicil he substituted other persons as trustees in lieu of those who were named in the will, and excepted a part of his real estates from the devise of his lands for the term of a thousand years. By a second codicil, having revoked the bequests and devises to the trustees named in the first codicil, he bequeathed and devised his personalty, and the residue of his manors, messuages, farms, lands, tenements, and hereditaments, for a term of a thousand years, to other trustees, upon the trusts in his will and codicils mentioned; and he then bequeathed an annuity in the following words: "I give unto

Miss Ann Marshall and her assigns, for and during the term of her natural life, the yearly sum of 20*l.*, which I will shall be paid to her and them by two equal half-yearly payments, the first payment thereof to begin and be made at the end of six months next after my decease, &c.; and *with the payment of such annuity, or yearly sum, I do hereby charge all the residue and remainder of my said manors, messuages, farms, lands, tenements, and hereditaments; and I do hereby direct that, in case of default or neglect of payment of such arrears or yearly sum, it shall be lawful for the said Ann Marshall and her assigns to distrain for the same, or such part thereof as shall be in arrear, as in the case of rent in arrear.”

FITZGERALD
FIELD.

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The question was, whether this annuity was charged primarily on the real estates, or whether the real estate was charged only in aid of the personalty.

Those who insisted that the annuity was a charge primarily on the lands, argued, that the only annuities charged on the personalty and on the term of one thousand years were the annuities given by the will; that this annuity of 20*l.* was not mentioned in the will; that the bequest of it contained no reference to the will; that the mode in which it was given, and the annexation of a power of distress, clearly made it a rent charge, issuing out of the land, without reference to the personal estate; and that there was a striking incongruity in supposing that Miss Marshall could at the same time claim to have a fund set apart for the payments of her annuity out of the personalty, or to have a sum sufficient for that purpose raised by the sale or mortgage of the premises comprised in the term of one thousand years, and yet be at liberty to resort to her power of distraining.

THE MASTER OF THE ROLLS:

May 3.

The same objection would apply to the annuity given by the will; yet that annuity, notwithstanding the powers of distress and entry by which it is further secured, is clearly a charge on the personal estate in the first instance; *and the gift of it must be considered as republished by the second codicil. Whatever might be the construction of the gift to Miss Marshall, if it rested only on those words of the codicil by which the annuity is

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v.
FIELD.

given and secured to her, it is evident, that, looking at the will and codicil together, the intention of the testator was, that all his personal estate should be applied, in the first instance, in payment of his annuities and legacies; and if that fund should be insufficient, that enough should be raised out of the term to make good the deficiency. My opinion, therefore, is that the personal estate is first liable to the payment of this annuity.

* * * * *

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1826.
April.
May 2, 3,
6—8.
Aug. 16.
—
Lord
ELDON, L.C.
[441]

VAN SANDAU v. MOORE.

(1 Russell, 441—474.)

A bill being filed by a shareholder in a joint stock company against the directors and other shareholders, in order to have the partnership dissolved, and the proper accounts taken; and fourteen of the directors, who all appeared by the solicitor of the company, having filed fourteen separate answers with long schedules to each, all of which answers and schedules were nearly *verbatim* the same: Held, that, in that stage of the cause, no inquiry could be directed into the necessity or expediency of filing those separate answers with a view to the defence of the suit.

The Court cannot require several defendants to join in their defence.

If a motion is intended to lay the foundation for a subsequent application against the solicitor of some of the parties, the solicitor, in his personal capacity, ought to be made a party to that motion.

A public officer empowered to sue and be sued on behalf a company does not represent the company for the purpose of internal litigation between the shareholders, and consequently a shareholder in a joint stock company cannot effectually sue such a public officer on behalf of himself and others of the shareholders for a dissolution of the concern.

Observations of the LORD CHANCELLOR on the legal history of joint stock companies, and on the provisions which have been introduced into Acts of Parliament, creating or regulating such companies, in order to give effect to legal proceedings to which they are parties.

A bill cannot be dismissed, for want of prosecution, by an order made as of course upon petition at the Rolls.

EARLY in 1824, a joint stock company was set on foot, called the "British Annuity Company." It was to consist of sixty thousand shares of 50*l.* each, forming a capital of 3,000,000*l.* which was to be employed in making loans by way of annuity.

[*442] Advertisements were *published and prospectuses were circulated,

describing the nature of the proposed company, and the mode in which its business was to be conducted; and by these the plaintiff, Mr. Van Sandau, a solicitor by profession, was, as he represented, induced to apply for some shares. Forty shares were accordingly allotted to him, on each of which he paid a deposit of 2*l*. The company was established; and, in the same year, an Act of Parliament was obtained, enabling them to sue and be sued in the name of their chairman or secretary for the time being. A deed of settlement was also prepared, containing the regulations by which the affairs of the company were to be managed; and it had been signed by many of the shareholders. Mr. Van Sandau, however, refused to sign it, on the ground that it contained provisions inconsistent with the advertisement and prospectuses, on the faith of which he had become a partner in the concern: and, being dissatisfied with the mode in which the affairs of the company were carried on, he, in October, 1824, filed a bill against the chairman and the secretary; praying that the company, and the defendants on behalf of the company, might be restrained from doing any act to deprive him of his shares, or from acting on the deed of settlement; and that certain directions might be given as to the mode in which the business of the concern was to be conducted.

Peter Moore, the chairman, and James Mitchell, the secretary, who were the only defendants, demurred generally for want of equity; and, upon the argument of the demurrer, they demurred also, *ore tenus*, for want of parties.

The LORD CHANCELLOR allowed the demurrer, for want of parties. His Lordship at the same time expressed an opinion, that, as the dissolution of the *company was not prayed, the Court could not grant the particular relief which the plaintiff asked.

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In May, 1825, Mr. Van Sandau filed a second bill, to which all the shareholders of the company, between two and three hundred in number, were made defendants.

He stated in it, that the partnership, no term having been prescribed for its duration, was dissoluble by notice, at the pleasure of any of the partners; and that he had, on the 30th of

VAN SANDAU April, 1825, sent a notice of dissolution to the secretary and to the solicitor of the company. This notice was addressed, "To all persons being members, shareholders, proprietors, or partners of or in, or composing the said company or partnership using the style or firm of British Annuity Company, to the persons calling themselves, acting as, or being directors thereof, and to the chairman, deputy-chairman, and secretary thereof, or whomsoever else it may concern." He further charged various acts of mismanagement, which, even if the company were not dissoluble by notice, gave him, as he contended, a right to have it dissolved by the interposition of the Court. The prayer was, that the company might be declared to have been dissolved, or might then be dissolved, that its affairs might be wound up, and that the persons styled directors might be restrained from acting in that capacity; but if the Court should be of opinion, that the company was not and ought not to be dissolved, then that the deed of settlement might be set aside; that a new deed might be prepared and executed, pursuant to the original advertisement and prospectus; and that the directors, chairman, and deputy-chairman, might be restrained from doing certain acts.

[*444] *Mr. John Wilks, jun.*, the solicitor of the company, and himself a defendant, entered appearances for fourteen *of the directors, and filed for them fourteen separate answers, each of which had long schedules annexed to it.

These answers, besides denying or palliating the acts of misconduct charged in the bill, stated that the deed of settlement which was complained of had been produced before the House of Lords, when the bill was in progress, in order to explain the general outline and scheme of the company; that the plaintiff, by refusing to execute the deed, and to pay the calls which had been made, had forfeited his shares, and ceased to have any interest in the concern; that the directors, though they were entitled to have declared his deposits forfeited, had been always willing to repay him his 80*l.* with interest; that the most fair and reasonable proposals had been made to him in order to induce him to desist from harassing the company, but that all those proposals had been rejected by him.

On the 14th of March, 1826, the plaintiff moved, before the Vice-Chancellor, [for an inquiry as to the propriety of the course adopted by the defendants in answering separately, and an order was obtained for such inquiry. A motion was now made before the Lord Chancellor to discharge that order, and the order was discharged on the ground that the application was premature and unprecedented.]

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In the course of his judgment, the LORD CHANCELLOR made the following observations:]

When we have the practice of the Court for a long series of years before us, and when we find ourselves getting beyond what that practice has hitherto sanctioned, we ought not to venture beyond known limits, except with very great caution and with a clear certainty that we are not introducing mischiefs much greater than the non-payment of the costs which the plaintiff aims at recovering by his present proceeding. * * *

[456]

I am of opinion, founding myself on the established practice of the Court, that the order made by the VICE-CHANCELLOR is too hazardous a *step,—if the object of the application be what I suppose it to be, and which indeed is the only practicable object which the Court could at this moment carry into execution, namely, making some order with respect to the costs of the answers.

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I am further of opinion that I ought not, in this stage of the cause, to direct an inquiry which may be attended with great expense to all parties, and on which the Court may, at last, not be able to do anything; or, if it can do anything, may be able to do no more than what I have already stated.

Again, if this were a motion intended to lay a foundation for an order against the solicitor, and not merely against the defendants, *Mr. Wilks* ought to have been made a party to it: and when I am told, as I have been told from the Bar, that *Mr. Wilks* was advised not to make an affidavit against the application, that advice, I do apprehend, must have proceeded on the old-established rule—that, when the notice was given to *Mr. Wilks*, only as solicitor for the parties, he had a right to consider himself as not personally implicated in the result of the motion.

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When a motion of this unprecedented nature is made, we are fully justified in looking at the case itself. The bill is filed by Mr. Van Sandau, who, upon a prospectus being handed about proposing the establishment of this company, was willing to become a member of the intended association. That prospectus represented the company as in the course of being established. Three millions of money were to be raised; no subscriber was to pay more than 50*l.* per share; and the first call was to be for only 40*s.* on the share.

[458]

Now the history of these companies has been such (and I have travelled a good deal among them), that a lawyer, as this plaintiff is, ought to have been not a little alarmed at parting with his money to a body so formed. It is quite clear that, in a commercial country like this, there may be many undertakings and enterprises to which individual powers of mind or purse may be quite unequal; and for such cases the constitution of the country has provided by giving the means of creating corporations. It is within my own memory, that, when an application was made to Parliament to incorporate bodies, it was generally met with this short answer: "Why have you not gone to the Crown with your request? Why have you not obtained a charter?" However, that mode of thinking has gone by, and several Acts of Parliament have been passed, establishing companies similar to this one.

There were not many of those Acts passed, before inconveniences were found to follow. If a man had occasion to bring an action against one of the bodies so constituted, he did not know how to proceed, or against whom to bring his suit; and if he brought it, naming the defendants who were known to him, he was treated with a plea in abatement, which was a check-mate to his action. To meet this inconvenience, it became necessary to introduce into those bills a clause, that the company should sue and be sued by their clerk or secretary.

It was soon found that this provision did not set the matter right. The secretary on behalf of the company sued a man of opulence; and, if he succeeded, he recovered not only judgment, but payment of the demand. On the other hand, when the secretary was sued, the person suing found that, though he had

gotten an individual with whom he could go into a court of law or equity in order to enforce a claim against him as *defendant, yet, after he had gone thither, he frequently found that it would have been better for him not to have stirred; for though the secretary, when he was plaintiff, got the money for which he sued, he was often unable, when made defendant, to pay what the plaintiff recovered.

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That state of things suggested to a learned lord the necessity of making all the members liable, as well as the secretary, for a demand against the company. Thus there arose a third class of Acts of Parliament establishing companies, Acts which made all the members, as well as the secretary, liable to answer demands recovered against the company. Still this was not enough; for, as these Acts did not provide the means of letting the world know who the members were, the consequence was that, though all the members were liable, nobody who had a claim against them could tell who the persons were that were thus liable.

Another improvement was therefore made. A proviso was introduced requiring that, before a company was formed, or within a given time afterwards, there should be a register or enrolment of the individuals of whom the company was composed; and it was thought that thus, at last, the work had been done completely, and that all was safe. Unfortunately, however, it turned out, in consequence of sales and transfers of shares, that a person, who was a member of the company to-day, was not a member of it to-morrow; the constituent members of the body were constantly changing; and a plaintiff did not know against whom to proceed, whether against the present or against former members.

A further alteration was then made, the effect of which was, that those who had been members should continue liable, although they had transferred their interest, *and that those who became members should also be liable; an enrolment of the names both of the one and of the other being required. This had a very considerable operation; and it was wonderful to observe how much, after it was adopted, the passion for becoming members of these companies diminished.

[*460]

One thing was still wanting. If the members of these bodies happened to quarrel among themselves (which, though they

VAN SANDAU came harmoniously together, was very likely to happen), how
 v.
 MOORE. were they to sue one another? And it was not till the latest
 stage of improvement, that that difficulty was provided for. I
 believe it was in the Act regulating the new banking establish-
 [*461] ments in Ireland,† that provisions were for the first time made to
 meet all *these difficulties, and similar provisions now form part
 of the regulations which are likely to take place in the banking
 establishments in England now in contemplation.‡

[462] There were some (and many, too, whose opinions were very
 well deserving of attention), who declared that if bodies were
 formed on such principles, that they could not, in the Courts of
 this country and according to the laws of the country, effectually
 demand what they had a right to demand, or be effectually sued
 for that for which they were liable—the very circumstance of
 the existence of that inability or incapacity, and the incon-
 venience or impracticability of dealing with them in a court of
 justice, proved bodies of that kind to be illegal at common law.
 It was to make them legal that Acts of Parliament were passed
 containing one or more of the series of provisions which I have
 mentioned.

* * * *

[463] The bill proceeds on two grounds: one, that *Mr. Van*
Sandau could by mere notice put an end to the company; the
 other, that if notice alone was not sufficient for that purpose, yet
 there has been such conduct on the part of the secretary and
 other members as to entitle the plaintiff to call for a dissolution;
 and, in either case, he prays that an account may be taken
 of the partnership dealings and transactions. Now, though,
 according to the law of the country, a company or partnership
 formed by parties agreeing to become co-partners may be dis-
 solved at any moment by one of the partners, and though his
 co-partners cannot answer his notice of dissolution by saying,
 “Here is your money, get out of the concern, and leave us to
 ourselves,” (because he has a right to have all the accounts of
 [*464] the partnership dealings *and transactions taken, up to that
 very moment); yet one difficulty which has often occurred to
 me as of great weight in cases like the present, with reference

† 5 Geo. IV. c. 73.

‡ 7 Geo. IV. c. 46 [and see 1 & 2 Vict. c. 96].

to the dissolution of the company by notice, is this : What avails it that you give notice to A. B. of putting an end to the company, if you do not give notice to the three hundred other individuals of whom it is composed ? Has not every one of these individuals the same common law right to notice before the partnership can be so dissolved ? If, on the other hand, it is said that it is not necessary to give notice to all the partners, it must be on the ground that the deed has made some provision declaring that notice not to be necessary, which, but for particular provisions, would be necessary ; and that case must be proved from the deed itself. But this plaintiff asserts that the deed is not binding ; and the deed, far from giving any special right to dissolve the company, will, I apprehend, if looked into, be found to withhold any such right.

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I have made these observations on the substance of the case. Now look to the form of the proceedings. The bill brings before the Court, not only the directors, but all the individual members, as far as they are known to the plaintiff, amounting to between two and three hundred. Now, can the plaintiff hope ever to bring to a conclusion a cause which is necessarily incumbered with so many defendants ?

* * * * *

The plaintiff has undoubtedly a right to come into this Court, and may be very properly advised to do so, though his suit may turn out to be such as cannot be maintained. For it would be a great deal too much for *counsel to take upon themselves to be judges, and telling the individual who applies to them that he cannot have relief, to refuse him the option of carrying his case into a court of justice, or to withhold from him their assistance for that purpose. On the other hand, it is to be remembered that every subject has a right to conduct his defence in such manner and by such agents, so far as the practice of the Court permits, as he may think proper. Whenever the cause comes to be heard, the Court will not discharge its duty, if it does not take care that full compensation for all that may have been improper and oppressive in the conduct of the defence be made to the party injured. But I dare not interpose in this stage of the proceedings to punish that on which the imputation of

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oppression is thrown, at the hazard of all the consequences that may follow in the future conduct of the suit. I dare not go the length of directing inquiries which call on individuals to lay open the whole materials of their defence. The Court has never hitherto interfered in this stage of a cause by such an order as the Vice-Chancellor has made here, and I will not make a precedent not justified by any example or principle which I know.

On these grounds, having before me fuller information in the cause than was presented to the Court below, I cannot permit this order to stand.

Order discharged.

Aug. 16.

After the judgment of the LORD CHANCELLOR was pronounced, the plaintiff dismissed his bill against such of the defendants as had not appeared [and he subsequently moved that his bill might, under the circumstances of the case, be dismissed, as against the above-named defendants, without costs].

[468] *Mr. Heald and Mr. Knight, for the motion.*

[469] *Mr. Hart, contra.*

THE LORD CHANCELLOR :

It wanted no authority to satisfy me that this Court has power, in proper cases, to dismiss a bill without costs, on the application of the plaintiff. * * *

[470] Now the question is,—whether this is one of the cases in which the plaintiff ought to be permitted, upon his own motion, to dismiss his bill without costs? As to the suggestion of directing a reference to the Master, I do not see why the Court should be called upon to make any reference with a view to modify the costs; for the Master cannot know more of the matter than the Court already does.

I can well recollect the period when nobody thought of entering into a partnership with a number of persons acting as a corporate body, unless under the authority of a charter or an Act of Parliament; and it was always thought a very beneficial thing, that, when particular privileges and benefits were given to bodies of men, the rest of the King's subjects should know

with whom they had to deal effectually, as often as it became necessary to enforce claims against such bodies, or to resist claims made by them. This Court has departed in a certain degree from the strict application of its principles in some of the cases in which it has permitted a few individuals to sue on behalf of themselves and others; a departure, however, which affords an extremely salutary rule of practice, when a suit can be so carried on with effect. But I may venture to say, that my predecessors were always of opinion, that, if bodies of men, whether consisting, or not, of a great number of individuals, took upon themselves to act as a corporation, no such form of record would do for them. There are, it is true, in this metropolis, and throughout the country, a great many partnerships, consisting of a *vast number of persons: but they do not come into courts of justice; they act by a mutual understanding and a kind of moral rule; and I believe that, in that way, they manage their affairs very well.

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When these joint stock companies were first thought of, it is wonderful how little attention was paid to their constitution. At first they were formed by a mere deed, though composed of a number of persons too great to be brought into any of his Majesty's Courts. Afterwards they were in the habit of applying to the Legislature for its sanction; and Lord REDESDALE, after some experience of their effects, took care to prevent any Acts from being passed giving a legal existence to such bodies, unless there were contained in them stipulations, that a memorial should be registered of the different individuals who were partners in the concern. This did some good, but not enough; for though the memorial told who the persons were with whom one had to deal, it gave you such a legion of names that it was to no purpose to attempt to sue them all. Another mischief was, that the name, which was in the memorial to-day, ceased to be in it before six months had expired; and those who had claims on the body, had no means of enforcing their remedies as against a person so withdrawing from the association.

Then came the improvement of permitting the secretary or treasurer of these partnerships to sue and be sued on behalf of the body. Unfortunately, however, it turned out that the

VAN SANDAU secretary who sued individuals, obtained payment from them ;
 t.
 MOORE. while, on the other hand, individuals who sued the secretary, got verdicts and judgments, and nothing more. This led to a further change, which made every individual liable to execution, in consequence of a judgment recovered against the secretary.

[*472] There was still one thing which had been totally overlooked. Though the secretary could sue and be sued by an individual not a member of the company, there had not been devised any means by which an individual, a member of the body, suing as an individual member the other members, could proceed. It was only in the course of the last year that this defect was removed.

I must here repeat that I have frequently ventured an opinion, in which I may be wrong (but in expressing it I meant to do good), that the impossibility of suing with effect was with me a very strong argument to prove that such a constitution of a body could not be legal.

[After referring to the previous proceedings in the suit, his Lordship concluded by saying:]

[473] The point, then, that came to be considered was this: Could Mr. Van Sandau ever expect to prosecute the suit with success, regard being had to the object with which the bill was filed? That he had a right to ask the opinion of the Court upon the matter, I most readily *admit; but it did appear to me to be a suit which could have no end whatever; for the parties who must be brought before the Court were so numerous, as to render it next to an impossibility that it could ever be brought to a conclusion, or made any use of, except as a means of expenditure in the shape of costs on the one side or the other, until the parties were tired of it.

[*474]

If I am right in this view of the suit, why am I to interfere to dismiss the bill, except on the ordinary terms? If the plaintiff has a mind to dismiss his bill in the usual way, let him do so; if he does not, no order can be made upon this motion, except that he pay the costs of it.

Subsequently, the parties agreed to refer it to an arbitrator to settle the terms on which the plaintiff should be permitted to dismiss his bill.

GODDARD v. SNOW.†

(1 Russell, 485—496.)

A woman, ten months before her marriage, but after the commencement of that intimate acquaintance with her future husband which ended in marriage, made a settlement of a sum of money which he did not know her to be possessed of; the marriage took place, she concealing from him both her right to the money and the existence of the settlement: ten years afterwards she died; and, after her death, he filed a bill to have the money paid to him: Held, that the settlement was void, as being a fraud on his marital right.

MARY PEETE, being entitled to a sum of 500*l.* due to her from SNOW, and to another sum of 400*l.*, executed a deed, dated the 28th of August, 1812, by which these sums were vested in SNOW, his executors and administrators, upon trust, to pay the interest to her during her life, for her separate use; and, after her death, upon trust for such person or persons as she should by deed or will appoint, and in default of appointment, for her next-of-kin. On the 16th of July, 1813, she intermarried with the plaintiff, Thomas Goddard: and she died about nine years afterwards, without leaving any issue. Besides the above sums, she was entitled to an annuity of 10*l.* a year, and to a life-interest in certain premises, worth also about 10*l.* a year. No settlement had been made upon her marriage.

After her death, the husband took out letters of administration to her; and, in May, 1823, he filed his bill *against the personal representatives of SNOW, and against the next-of-kin of his deceased wife. It alleged that he had never been aware of her right to these sums of 500*l.* and 400*l.*, or of her receipt of the interest which accrued due on them; that their marriage was in contemplation, and the treaty for it pending, at the date of the execution of the settlement of the 28th of August, 1812; and that that deed, being made without his knowledge or consent, was fraudulent as against him. The prayer was, that he might be declared entitled to the 900*l.*, and that the personal representatives of the trustee might be ordered to pay it to him.

The next-of-kin of the deceased wife admitted, by their

† *Downes v. Jennings* (1863) 32 come in question as to marriages
Beav. 290. In England the doctrine since Jan. 1, 1883 (*Married Women's*
of fraud on marital right cannot now Property Act, 1882).—F. P.

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May 1.

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answer, that she and the plaintiff had been on terms of intimacy and friendship previously to the year 1812; that a treaty of marriage was for some time pending between them; and that their marriage was agreed upon in 1812.

The time when the treaty of marriage began, or was first in contemplation, was not accurately fixed by the evidence. Some of the witnesses carried its commencement back to upwards of a year before the solemnization of the marriage. They, however, appeared not to have any accurate knowledge of the fact, but to speak from having seen the parties frequently together, and on terms of great intimacy.

One witness stated, that, the morning after the marriage, she asked Mary Goddard, how she intended to leave her money, and Mary Goddard replied, "that she had put it entirely out of her power, and that neither principal nor writings should ever be in her own house; so that it should be out of the power of any husband to touch it."

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The only witness to the deed was the solicitor who prepared it; and he, upon his cross-examination, stated, that he was requested to prepare the settlement either by Mary Goddard or by William Snow; that, a short time before it was prepared, he attended at Snow's house for the purpose of receiving instructions, and that Mary Goddard and William Snow were the only persons present with him at that meeting; "that, either at the time of his receiving instructions, or at some subsequent time, before or at the time of signing, sealing, and delivery of the indenture, some conversation took place between Mary Goddard and William Snow, or one of them, with the deponent, which induced him to understand and believe that the indenture of settlement was made by Mary Goddard with a view to her marriage with the plaintiff, and to secure her property upon herself in the event of such marriage;" but the deponent could not positively say that "Mary Goddard told him she was to be married to the plaintiff, or that the indenture of settlement was made in anticipation of such marriage, or with a view to secure her property upon herself in the event of such marriage."

The trustees stated, by their answer, that the interest of the 900*l.* had been paid to the wife during her life; but there was no evidence of any such payment.

Mr. Shadwell and Mr. Whitmarsh, for the plaintiff:

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This settlement was made pending the treaty of marriage. Its object was to exclude the marital rights of Goddard, when the marriage should have taken place; and it was concealed from him. It was, therefore, in the contemplation of a court of equity, a fraud on his marital rights; and there is a numerous class of cases, shewing that, under such circumstances, the Court will *give the husband relief against such a settlement so made.

[*488]

Mr. Horne and Mr. W. Kay, for the defendants [cited Strathmore v. Bowes †]:

There is not a single case, in which a settlement of property, the existence of which was not known to the husband, and could have had no influence on his purpose of contracting marriage, has been held to be fraudulent.

Such settlements have hitherto been questioned only when they were made a very short time before the marriage. Here the deed is prior to the marriage by more than ten months; and the Court will go farther than it has ever yet done, if it interferes, when so long an interval *has elapsed between the date of the instrument and the date of the marriage. * * *

[*489]

It is not probable that, during a coverture of ten years' continuance, the existence of the money and of this settlement should have remained unknown to him. It appears that the interest was paid to his wife. Is it likely that, in the humble situation of life in which the parties were, the possession of a sum of 40*l.* or 50*l.* a-year by his wife should never have manifested itself in a way to excite his attention or his curiosity?

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THE MASTER OF THE ROLLS:

Aug. 4.

Undoubtedly, in most of the cases which have occurred, the settlement which has been impeached was made at a much shorter period from the date of the marriage than ten months. But the greater or less interval between the date of the instrument and the date of the marriage, though a circumstance material to be attended to, will not alter the principle. It must be made out in evidence, that, at the time of the execution of

† 2 Br. C. C. 345; see 1 R. R. 76.

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the settlement, marriage was in the contemplation of the parties; that the woman executed the settlement in contemplation of the future marriage; and that she concealed it from her future husband. If these facts be proved, the cases have established the principle, that such a settlement cannot stand against the marital right of the husband.

[*491]

The settlement of the 28th of August is carefully framed, with a view to prevent any husband, with whom Mary Peete might intermarry, from interfering with or deriving benefit from the 900*l.* which was the subject of it, and to preserve that money exclusively for the wife. It is clearly established that, at that time, the acquaintance *had commenced between the plaintiff and Mary Peete, which terminated in their marriage. The cross-examination of the subscribing witness to the deed shews, that, according to his understanding, a marriage was in contemplation between these parties at the time when the deed was executed, and that the settlement was made with a view to the marriage; and that impression must have been made on his mind either by Mrs. Goddard, or by her trustee and confidential friend, Mr. Snow, from one or other of whom he received his instructions.

The plaintiff states that this settlement was concealed from him, and that he had no knowledge of the existence either of it or of the property to which it related. It was impossible for him to give positive evidence of a negative allegation of such a kind; but if he had known of the settlement, or in any way recognized it, the defendants might have proved that fact. They have not attempted, however, to give any evidence tending that way. It appears, also, from the testimony of one of the witnesses, that Mrs. Goddard, the morning after her marriage, declared, that she had put the money entirely out of her own power, and that neither principal nor writings should ever be in her own house, so that it should be out of the power of any husband to touch it:—clearly demonstrating what the intention of Mrs. Goddard had been in executing this settlement.

Upon this state of circumstances the question arises, whether the execution of such a settlement by the wife and the concealment of it from the husband, be not a fraud on his marital rights, which he is entitled in a court of equity to avoid.

[After referring to the authorities, the MASTER OF THE ROLLS concluded by saying:]

In the present case, the deed of the 28th of August, 1812, was intended by Mary Peete to be in fraud of the marriage which she was about to contract. It is not necessary to go the length of saying, that a settlement made in contemplation of marriage with any one (though much might be said on the validity of such a settlement), is void as against the future husband. It is enough to say, that it is here established, that an intimacy had commenced between the parties, with a view to marriage; that, after that intimacy with a view to marriage had commenced, this settlement was made by Mary Peete, disposing of a considerable part of her property, to the *exclusion of her future husband; and that it was concealed from him. This case, therefore, falls within the principle which avoids deeds made in fraud of the marital rights of the husband.

It is said that Goddard subsequently assented to this settlement; but that suggestion is entirely groundless. There is not a particle of evidence that he was aware even of the existence of this property, till shortly before the filing of the bill.

The decree, declaring the husband to be entitled to the money, was made without costs against the next-of-kin. The costs of the trustees under the deed were to come out of the fund.

BERKELEY v. PALLING.

(1 Russell, 496—499; S. C. 4 L. J. Ch. 226.)

A testator directs the residue of his property to be divided into eight equal shares, and disposed of "as follows among the children of A. B.:" he then gives two shares to each of the two daughters, and one share to each of the three sons of A. B., making together only seven shares: Held, that the whole residue is divisible amongst the children of A. B. in seven parts; each daughter taking two of those seventh parts, and each son one.

GENERAL HAYNES made a codicil to his will in the following words:

"It is also my will and desire that the remainder of my fortune and property of any description whatsoever, should be

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collected, converted into cash, divided into eight equal shares, and disposed as follows amongst the children of the late Rowland Berkeley and Mary Berkeley, his wife, of Benfield, in Northamptonshire, viz. To Mary Anne Berkeley, two (2) shares; To Elizabeth Berkeley, two (2) shares; To Charles Berkeley, one (1) share; To Rowland Berkeley, one (1) share; To Miles *Berkeley, one (1) share; subject to any future alteration I may hereafter make or direct to be made."

[*497]

No alteration was made in this disposition.

The five children named in the codicil were the only issue of Rowland Berkeley and Mary Berkeley, and were all living at the time of the testator's death. They were plaintiffs in the suit.

As the residue was to be divided into eight shares, and the number of shares expressly given amounted only to seven, there remained one share, of which, it was contended, no disposition was made. On the other hand, the five children of Mr. and Mrs. Berkeley claimed the whole of the residue, as bequeathed to them by the codicil, though the detailed enumeration of the shares which they were to take comprised only seven-eighths of it.

Mr. Pepys and Mr. Turner, for the Berkeleys. * * *

[498]

Mr. Wray, contra. * * *

THE MASTER OF THE ROLLS :

The only question is, whether, upon the words of this codicil, the Court can collect, with sufficient clearness, an intention to divide the whole residue among the children in the proportions, as between one another, which he has specified in his enumeration of the shares which each *child was to take. If it can collect such an intention, it will consider that there was a mistake in using the word " eight."

[*499]

Now the testator has unquestionably directed the residue to be divided into eight equal shares; but he also says that it is to be disposed of among the children of Rowland Berkeley and Mary Berkeley; and though, when he comes to describe how that disposition or distribution is to be made, he enumerates only

seven out of the eight shares, it is plain that he did that in error. The division into shares seems to have been directed only with a view to apportionment among the children; and my opinion is, that, according to the true construction of the codicil, there is a mistake in using the word "eight," and that this property should be distributed into seven shares instead of eight, each of the daughters to take two of those shares, and each of the sons, one of those shares.

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HOLLINRAKE v. LISTER.

(1 Russell, 500—509.)

1826.
June 1, 5.

Rolls Court.
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[500]

G., having by deed given his niece a life interest in some real property, by his will devises to her other real property in fee, and then directs the debts due to him from her husband to be released, on condition that, within two months from his the testator's decease, the husband shall release all claim in or to the property which the testator had given or should give to the wife:

Held, that the release, which the husband is to execute, is to be in favour of his wife, and not for the benefit of the estate: also, that the husband does not forfeit the benefit intended for him by not executing, within the time limited by the will, such an instrument as the testator required of him.

JOHN GREENWOOD, having, by an indenture of settlement, dated in March, 1814, conveyed certain freehold estates to trustees, upon trust, for himself for life, with remainder to Betty Ackroyd and his niece, Grace Hollinrake (then Grace Holgate, spinster) for their joint lives equally, and the life of the survivor of them, afterwards made his will, bearing date on the 16th of August, 1820, and appointed the defendants trustees and executors thereof. By that will the testator devised one-third part of eight seats in the parish church of Heptinstall to Grace Hollinrake, her heirs and assigns: and immediately after that devise came the following clause:

"Whereas James Hollinrake, who married my niece, Grace Hollinrake, formerly Grace Holgate, spinster, is indebted to me, for divers sums of money paid by me for and on his account, and also for shop goods: Now I do hereby give, forgive, acquit, and release him from all debts and demands whatsoever which

HOLLINRAKE v. LISTER. he may owe me at the time of my decease, on condition that he do and shall, within two months next after my decease, sign a release or releases of all claims or demands whatsoever which he may or can claim in or to the life estate or otherwise of any property I have or may hereafter give and bequeath to his said wife, Grace Hollinrake, to all *intents and purposes whatsoever, but not otherwise; and on complying to such condition, I do hereby will, order, and direct that my trustees and executors hereinafter named do and shall excuse and release him from all such debt or debts whatsoever, if he signs such release as aforesaid within the time mentioned, but not otherwise." In a subsequent part of his will, the testator devised and bequeathed the residue of his real and personal estate to the defendants, upon trust, out of the rents and dividends thereof to pay to his niece Grace Hollinrake an annuity of 5*l.* during her life "for her own sole separate use and benefit, notwithstanding her coverture, and so that her receipt alone, notwithstanding her present or any future husband, should be a sufficient discharge to her executors and trustees."

At the time of the testator's death, James Hollinrake was indebted to him in two sums, one of 465*l.* and another of 59*l.* James Hollinrake not having within the two months executed the release required by the testator's will, Royal Lister and John Smith brought an action against him for the recovery of those sums. Hollinrake thereupon filed his bill, praying that he might be declared to have been released and discharged by the will of the testator from all debts which he owed him at the time of his decease, or that the defendants might be decreed to execute such instrument as might be requisite to release him from those debts; that it might be also declared whether it was necessary, in order to effectuate the intentions of the testator, that the plaintiff, James Hollinrake, should execute any release for the benefit of his wife, he offering to execute for that purpose such release or deed as the Court should think proper; and that the defendants might be restrained from proceeding against him at law.

[502] The bill stated that Hollinrake had been, at all times since the death of the testator, ready and willing to execute any

release or other assurance for the benefit of his wife, Grace Hollinrake, or for the purpose of settling on her, for the joint lives of himself and her, the rents and profits of the real estate which she had derived from her uncle; that James Holgate, one of the executors, had deemed it unnecessary, and that the other executors had never required that he should do so; and therefore, that, although in a court of law he might not be entitled to the benefits intended to be conferred on him by the will, in consequence of his not having complied literally with the words of the condition, a court of equity ought to relieve him from any legal forfeiture or loss which he might have so incurred.

The executor, Holgate, by his answer, concurred with the plaintiffs.

The executors, Lister and Smith, by their answer, insisted that the intention of the testator was, that James Hollinrake should either pay the 465*l.* and 59*l.* to the estate of the testator, or, within two months from the testator's death, release, for the benefit of the testator's personal estate, all the interest which he took in right of his wife during their joint lives, by virtue either of the settlement or of the will made by Mr. Greenwood; that the execution of such release within the two months was a condition on which, and on which only, there was given to the plaintiff the legacy of the debts due from him; and that, not having fulfilled that condition, he had forfeited all title to the benefit which was made dependent on it. In aid of the construction for which they contended, they further stated, that the personal estate of the testator, exclusive of the monies due from James Hollinrake, would be insufficient for the payment of his debts and his *funeral and testamentary expenses. They admitted that they had not required James Hollinrake to execute any release, or make any settlement for the benefit of his wife, and that they had refused to release him from the two debts, unless he would release or assign, for the benefit of the testator's estate, all the interest that he took in right of his wife.

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v.
LISTER.

[*503]

Mr. W. H. Ludlow, for the plaintiffs :

The first question is, what is the construction to be put on the condition annexed to the benefit given by the will to James

HOLLINRAKE Hollinrake? For whose advantage was that condition intended?
LISTER. whether for the advantage of the wife, or of the testator's assets? The condition is, that the husband shall release all his claim and right to any property which the testator had given, or should give, to the wife. Such a release could be meant only to extinguish or bar the husband's interest, not to assign it to the executors; and the effect of such a release would be to leave the interest of the wife unimpaired, but discharged from those claims and rights which the law confers on the husband.
 * * *

[*504] The second question is, whether, whatever be the construction of the condition, James Hollinrake has forfeited the benefit of the bequest, by reason of his not having executed a release within two months of the testator's *decease, so that this Court will not relieve him. He was always ready to execute such a release as he conceived to be according to the intention of the will, and he communicated his willingness to the executor, Holgate. It was the opinion of the executor that a release to the wife was totally unnecessary. The annuity of 5*l.* was so secured to her separate use by the will, that no instrument could be contrived which would more effectually exclude the marital rights of the husband; and, as to the real estate, a release from the husband to the wife would have been entirely inoperative. For these reasons, no release was executed. The non-performance, therefore, of the condition within the time stipulated, has arisen either from mistake or from the difficulty of ascertaining what was the precise thing which it required to be done; and, on either ground, a court of equity will relieve against the literal construction of the condition, and from the forfeiture which would be incurred if strict compliance with its terms were demanded.

Mr. Heald, for the executor Holgate, did not resist the plaintiff's claim.

Mr. Skirrow, for the executors Lister and Smith:

[505] * * The condition is a condition precedent; for it is only on his complying with it, and his signing the release within two

months from the testator's decease, that the executors are to release the debts to him. He cannot acquire any right or interest under the will until that condition be performed; and it is now impossible to perform it, because the two months have long since elapsed. The Court cannot relieve him from the forfeiture which he has thus incurred; because it has no authority to make the benefit given by the will take effect upon any other event than that which the will has prescribed.

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v.
LISTER.

Mr. Ludlow, in reply :

The condition is not a condition precedent. The benefit given to Hollinrake was intended to be immediate; and the condition was annexed only with a view to divest it, if he did not perform a certain act. * * Upon the execution of the release by Hollinrake, the executors were to execute to him a release of his debt. Thus there were mutual acts to be done, and the executors might not have been in a situation to perform their part of the condition. They might not have proved the will within the two months, and in that case they could not have given a valid release; many of the testator's debts might have been unpaid at the end of the two months. * * *

[506]

THE MASTER OF THE ROLLS :

[507]

It does not distinctly appear whether the settlement made in 1814 was bounty conferred by Mr. Greenwood on Mrs. Hollinrake, then Grace Holgate; but I suppose the settlement is stated in the bill for the purpose of shewing that, exclusive of the benefits given her by the will, she has interests proceeding from the bounty of the testator.

The defence made by the executors Lister and Smith, raises two questions. First, they contend that, according to the true construction of the will, Hollinrake was bound to have released, in favour of the estate of the testator, any interest which he might have in property that his wife had derived from Mr. Greenwood. Secondly, they say that, whatever may be the construction of the clause on which the question arises, yet Hollinrake, in consequence of not having executed any release within the time limited, has forfeited all the benefit which he might have claimed under the will.

HOLLINRAKE On the first question, my opinion is that, according to the
 v.
 LISTER. true construction of the will, the husband was to relinquish, for the benefit of the wife, any interest that he might have in property which she took from the testator, but that he was not to release his interest in such property in favour of the estate of the testator.

[*508] On the second point, it was argued that the execution of the release was a condition precedent, and that, the time within which the condition was to be fulfilled being *elapsed, Hollinrake cannot now put himself in a situation which will entitle him to the benefit of the bequest.

Where there is a condition precedent to the vesting of the interest of the devisee, and, on his failing to perform the condition, the property is given over, that condition must be complied with strictly. If it is not so complied with, the property vests in the person in whose favour the gift over is made, and this Court cannot interfere to set up the prior gift. The rule is otherwise where there is no bequest over. The distinction is recognised in *Taylor v. Popham*,† a case which, in one respect, is stronger than the present; for there Taylor, the legatee, had not only omitted to execute the release within three months, as required by the will, but had absolutely refused to execute the release, and filed a bill to assert claims incompatible with it. Yet even there Lord THURLOW thought that Taylor was not bound by what he had done, or omitted to do, and that he was still at liberty to comply with the condition; and he mentions it as the “common rule of the Court, as to conditions precedent,” —that, “If the Court can put the parties in the same situation as if the condition had been performed, it will never suffer a forfeiture to attach.” The doctrine, therefore, of this Court is, that where there is no bequest over, he who derives a benefit under the will, on condition of his executing a release within a specified time, shall not be deprived of that benefit in consequence of his not having executed the release within the prescribed period, if the parties can be placed in the same situation as if the condition had been strictly performed.

† 1 Br. C. C. 167.

It must be referred to the Master to inquire what property Grace Hollinrake derived from the testator *under the will or otherwise; and, upon her husband's executing a settlement of such property to her separate use, the defendants must execute to him a release of the debts in question.

HOLLINRAKE
v.
LISTER.
[*509]

BROAD v. BEVAN.

(1 Russell, 511, n.—514, n.)

1823.
Dec. 22.

A testator having bequeathed various legacies, and, among others, an annuity of 5*l.* to his daughter during her life, directs his son (whom he afterwards makes his executor) to take care of and provide for her; and "subject as aforesaid," he gave to that son the residue of his real and personal estate: Held, that the daughter is entitled to a provision out of the residue, in addition to her annuity; and a reference was directed to the Master, to fix the amount of such provision.

Rolls Court.
PLUMER,
M.R.
[511, n.]

THE will of William Bevan, dated the 20th of May, 1814, after various bequests, proceeded in the following words, "I give and bequeath unto my daughter Ann, now living with me, the sum of 5*l.* a year for her life, payable half-yearly by my executor. I also order and direct my son Joseph to take care of and provide for my said daughter Ann during her life. I give to the daughter of my said *daughter Ann the sum of 100*l.*, to be paid to my said grand-daughter on the death of her said mother:" and "subject as aforesaid," the testator devised and bequeathed unto his son, Joseph Bevan, and to his heirs and assigns for ever, all his freehold estate, farms, lands, and hereditaments, and also his personal estate and effects, and appointed him sole executor of his will.

[*512, n.]

Ann Wickstead (mentioned in the will as his daughter Ann) was a widow.

The real estate of the testator had been sold; and the proceeds of it brought into court. The only claim, which, under the decree directing an account of legacies, had been carried in before the Master on behalf of Ann Wickstead, was in respect of her annuity of 5*l.*; and that annuity had been duly provided for by the appropriation of a sufficient sum. After a decree had been made, on further directions, ordering the residue to be paid over

BROAD
v.
BEVAN.

to Joseph Bevan, but before it was drawn up, she, for the first time, asserted a claim to a further provision. To prevent delay, Joseph Bevan, the executor and residuary legatee, left 800*l.* stock in court to answer her demand, if the Court should be of opinion that her claim was well founded.

Ann Wickstead then presented a petition, insisting that she was entitled to have a provision made for her out of the produce of the testator's estate, and praying that she might be declared entitled to the 800*l.* stock, which had been carried over to the account of her claim.

Mr. Parker, for the petition :

[*513, n.] The direction to Joseph to take care of and provide for Ann, and the bequest to him of the residue of the real and personal estate, "subject as aforesaid," (that is, subject to the payment of the different legacies and annuities, and to providing for and taking care of Ann), create a charge upon the residue. The fund, upon which this charge is made to attach, is certain ; the person who is to make the provision, *is defined ; and the present uncertainty of the amount of the charge is no objection to its validity, for the Court has the means of rendering it certain by a reference to the Master, who, taking into account the circumstances of Ann, will determine what provision for her will answer the intention of the testator.

Mr. Russell, *contra* :

The clause on which the petitioner rests her claim is rather a moral injunction, having reference to personal care and protection, than a pecuniary bequest. * * *

SIR THOMAS PLUMER, M.R.

[514, n.] Was of opinion, that the petitioner was entitled to have a provision made for her out of the residue, in addition to her annuity of 5*l.*

The order made was "that it be referred to the Master to inquire and state to the Court, what will be proper to be allowed

for the maintenance and support of the petitioner, Ann Wickstead, from the month of March, 1818, when the defendant ceased to maintain her, and for the time to come during her natural life, or until the further order of this Court."

* * * * *

BROAD
v.
BEVAN.

ABRAHAM v. ALMAN.

(1 Russell, 509—517.)

1826.

Rolls Court.
Lord
GIFFORD,
M.R.

[509]

A testator bequeaths to "his only son 60*l.* per year for ever: also to provide for the two daughters of H. E. and the remainder of his property to the two children of S. A.:" Held, that, under these words, the two daughters of H. E. do not take any benefit.

THE will of Lazarus Jacobs, dated on the 13th of April, 1796, was in the following words: "I, Lazarus Jacobs, do will and bequeath unto my wife, Mary Jacobs, the sum of 100*l.* sterling per year for her natural life, with all the plate and other property in the house, and after her decease to go to the two children of my daughter, Sukey Alman. I do likewise will and bequeath to my only son, Isaac Jacobs, the sum of 60*l.* sterling per year for ever; also to provide for the two daughters of my child, Hannah Emden, namely, Sarah Emden and Esther Emden, and the remainder of my property to the two children of my daughter, Sukey Alman."

The bill was filed by the two daughters of Hannah Emden and the husband of one of them against the two residuary legatees, Isaac Jacobs, and the administrator, with the will annexed, of the testator. The prayer was, that the administrator might be directed to pay to the plaintiffs, the daughters of Hannah Emden, such sum as might be considered adequate to their maintenance for the time past, and to make them a proper allowance for the future.

Mr. Shadwell and *Mr. Trollope*, for the plaintiffs. * * * [510]

Mr. Wakefield, for the residuary legatees [cited *Cruwys v. Colman*,† *Mohun v. Mohun*,‡ and other cases].

† 7 R. B. 210 (9 Ves. 319).

‡ 13 R. B. 58 (1 Swanst. 201).

ABRAHAM
v.
ALMAN.
[511]

Mr. Tinney, for the assignee of Isaac Jacobs. * * *

Mr. Shadwell, in reply [cited *Broad v. Bevan*].

June 13.

THE MASTER OF THE ROLLS :

[515]

* * I have endeavoured to bring my mind to view the words on which the plaintiffs rely, as sufficient to create a trust attaching on the property given to the two children of Sukey Alman ; but I am unable to arrive at that conclusion. The property given to these two children is the remainder of his property, that is to say, what remained after satisfying the previous charges, of which the provision intended for the Emdens must have been one. The testator had no doubt intended to make a provision for the Emdens ; but his purpose seems to have been to do so by a distinct provision, and not by attaching a charge upon what was given beneficially to others. What this provision was to be, or in what manner or out of what fund to be made, the Court has no means of determining. *Was the provision to be made by a payment to the children of Hannah Emden during their respective lives, or by the payment of a sum in gross ? How was the amount of it to be calculated ? It appears to me impossible to give any certain construction to the clause on which the plaintiffs found their claim.

[*516]

[His Honour distinguished *Broad v. Bevan*,† saying:] In the present case, there is no direction that the two children of Sukey Alman are to take care of or provide for the children of Hannah Emden ; and as the individuals to whom the residue is given are described as children, it is difficult to suppose that he meant them to be trustees for others.

[*517]

The testator meant no doubt to make a provision for the children of Hannah Emden ; not, however, by way of charge on the annuity given to Isaac Jacobs, or on the residue bequeathed to the Almans, but by a distinct gift. Unfortunately he has not expressed his purpose sufficiently. All that he has said with respect *to this intended bounty is so uncertain, that it is impossible for the Court to decree any provision for the children of Hannah Emden.

Bill dismissed.

† *Ante*, p. 123.

BRADSHAW *v.* BRADSHAW.

(1 Russell, 528—529).

If two persons are appointed by the Court guardians of an infant during his minority, or until further order, the guardianship is at an end on the death of one of them, and there must be a new appointment.

By a decree made on the hearing of this cause in 1818, it was referred to the Master to approve of a proper person or persons to be appointed guardians of the infants John and James Edward Bradshaw: and in pursuance of that direction, Edward Greaves and Elizabeth Ann his wife were appointed guardians. The order appointing them was in these words: "It is ordered, that Edward Greaves and Elizabeth Ann his wife be appointed guardians of the infants John Bradshaw and James Edward Bradshaw respectively during their respective minorities, or until the further order of the Court."

Edward Greaves died. A petition was then presented in the name of the infants, praying that it might be referred to the Master, to approve of a proper person or persons to be appointed guardians of the infants in the room of Edward Greaves, deceased, and Elizabeth Ann his wife.

Mr. Heald and *Mr. Bellasis*, for the petitioners [contended that the office did not survive].

Mr. Agar, *Mr. Duckworth*, and *Mr. Parker*, against the petition, insisted that the guardianship did survive. * * *

THE MASTER OF THE ROLLS

Stated, that he had of late had occasion to inquire into the subject; and he had found that, where guardians were appointed by the Court, the office did not, upon the death of one of them, survive to the others. There had recently been several petitions before him of the same sort with the present one; and they had all been considered as matters of course.

He accordingly made the order, that it should be referred to

1826.

June 15.

Rolls Court.

Lord

GIFFORD,

M.R.

COPLEY,

M.R.

[528]

[529]

BRADSHAW the Master, to approve of a proper person or proper persons to
 v. be guardian or guardians of the infants, in the place of Edward
 BRADSHAW. Greaves and Elizabeth Ann his wife.

Lord GIFFORD having died before the order was drawn up, the petition was afterwards mentioned to Sir JOHN S. COPLEY, M.R. and was again opposed by *Mr. Agar*.

Sir JOHN S. COPLEY approved of the decision of Lord GIFFORD; and directed the order to be drawn up.

1826.

June 27.

Rolls Court.

Lord
GIFFORD,
M.R.

[530]

WILSON v. METCALFE.

(1 Russell, 530—537.)

After the time is ascertained at which the mortgage debt of a mortgagee in possession was paid off, annual rests from that date will be made in the accounts against him, though rests were not directed by the previous orders and decrees under which those accounts were taken.

Annual rests are directed in an account of occupation rent as well as in an account of rents and profits received.

Where a prior decree has ordered the costs of a defendant mortgagee to be taxed, he will be entitled to his costs,† though it appears at the hearing on further directions that his debt was paid off before the commencement of the suit, and that he has set up an improper defence.

IN 1777, Elizabeth Newlove mortgaged a small estate to Halden and Spencelay for the sum of 450*l*. In 1793, the mortgage was assigned to John Ness; and, upon his death, in January, 1802, it became vested in his executrix, Ann Ness. The mortgagees had been long in the possession of the mortgaged premises.

In 1803, Elizabeth Newlove being dead, the plaintiffs, claiming as her residuary legatees and devisees, filed a bill for the administration of the trusts of her will, and to have the mortgaged estate sold. To that suit the mortgagee, Ann Ness, was made a party, in order that the mortgage might be redeemed, if anything remained due upon it; and she, by her answer, insisted that no part of the principal of the mortgage money had been paid off by the receipt of the rents and profits of the lands.

† *Brown v. Burdett* (1887) 37 Ch. D. 207.

When the cause came to a hearing in 1807, the mortgagee questioned the title of the plaintiffs to redeem; objecting, that the heir-at-law of Elizabeth Newlove was a necessary party, inasmuch as it was doubtful, looking at the words of her will, whether the equity of redemption belonged to her heir, or to her residuary legatees and devisees. Accordingly, an inquiry was directed, to ascertain who was the heir-at-law. That inquiry led to the trial of an issue; and, finally, it was proved that John Bentley was the heir-at-law. He, being brought before the Court, did not by his answer set up any claim to the equity of the redemption.

WILSON
v.
METCALFE.

In the meantime, Ann Ness died in 1814, leaving John Ness, Elizabeth Ness, and Mary Ness her executor and executrixes. John Ness and Mary Ness continued in *the occupation of part of the mortgaged premises, and in the receipt of the rents and profits of the remainder.

[*531]

On the 16th of June, 1819, a decree was made, "That the will of Elizabeth Newlove be established, and the trusts thereof performed and carried into execution: and that it be referred to the Master to take an account of what is due to the defendants John Ness, Elizabeth Ness, and Mary Ness, as executors of the late defendant Ann Ness, for principal and interest on the mortgage made by the testatrix to Henry Halden and William Spencelay, and afterwards assigned by them to John Ness, deceased, the husband of the late defendant Ann Ness, to whom she was executrix; and to tax the costs of the defendants John Ness, Elizabeth Ness, and Mary Ness, and also the costs of the said late defendant Ann Ness, in this Court and at law." And it was ordered, "that the Master should also take an account of the rents and profits of the said mortgaged premises received by the said Henry Halden, William Spencelay, and John Ness, and by the said late defendant Ann Ness, and the defendants John Ness, Elizabeth Ness, and Mary Ness, or any of them, or by any other person or persons by their or any of their order." The subsequent part of the decree, after giving some directions as to the costs of other parties, reserved the consideration of further directions.

Subsequently, the Master was directed to fix an occupation

WILSON
v.
METCALFE.

rent of the premises which had been in the personal occupation of the mortgagees.

The Master by his general report, made on the 10th of March, 1824, found, that the mortgagees had been overpaid by the sum of 1,025*l.* 5*s.*, though he allowed them interest on the 450*l.* up to that date.

[532]

On the 16th of December, 1824, it was ordered, among other things, that the Master should inquire at what time the principal and interest upon the mortgage had been paid off, and that he should carry on the accounts of the occupation rent and of the rents and profits of the mortgaged premises received by the personal representatives of Ann Ness.

The Master certified that the principal and interest of the mortgage debt was paid off on the 22nd of August, 1801; and, therefore, in addition to the sum of 1,025*l.* 5*s.* before reported to have been overpaid, he charged the personal representatives of Ann Ness with a further sum of 504*l.* 7*s.* 6*d.*, being the amount of interest from the 22nd of August, 1801, to the 10th of March, 1824, which he had before allowed them.

The cause coming on for further directions, two questions were raised :

First, Whether the Court could now order annual rests to be made in the account of the occupation rent and of the rents and profits of the mortgaged premises, and interest to be computed against the mortgagees.

Secondly, Whether, under the circumstances of this case, the mortgagees were entitled to their costs.

Mr. Sugden and *Mr. Daniel*, for the plaintiffs :

[533]

* * The defendants are in the situation of mortgagees who have insisted that the whole of the debt remained unsatisfied, though it now appears that it was entirely paid off before the filing of the bill. They ought to bear the costs of the suit, which has been rendered necessary only by their refusal to do justice, and their obstinacy in persisting in that refusal. At least, they cannot, after such misconduct, be entitled to receive costs.

Mr. Pepys and Mr. Spence, for the personal representatives of Ann Ness :

WILSON
v.
METCALFE.

[534]

* * Annual rests cannot now be directed in the accounts. It is true, that they were made in *Quarrell v. Beckford* ;† but there they were directed by the original decree, though interest was not allowed till the cause was heard on further directions. Here the accounts have been taken and prosecuted under various successive orders and decrees ; and never, till the present moment, have the plaintiffs asked that annual rests should be made.

At all events, it is contrary to the habit of the Court to direct annual rests with respect to an occupation rent. * * *

Mr. Sugden, in reply :

The plaintiffs did not ask for annual rests in the previous stages of the suit, because it was not then known at what time the mortgage debt was paid off. While any part of that debt remained unsatisfied, they had no right to charge the mortgagees with interest : and, therefore, until the date was fixed from which they were entitled to have interest computed, they were not in a situation to ask for rests, which are made only with a view to the computation of interest.

In fixing an occupation rent, the Master cannot take into consideration anything, except the yearly value of the premises to an occupier ; and the occupation rent is not to vary according as the Master may think that rests ought or ought not to be directed. It is the daily habit of the Court to direct, in proper cases, rests to be made in an account of occupation rent, as much as in an account of any other kind.

[535]

The direction to tax the costs is not a direction to pay them and even the direction to tax was given at a time, when the Court was not aware that the mortgage had been paid off before the commencement of the suit.

THE MASTER OF THE ROLLS :

On the question of rests I have no doubt ; and those rests the Court has authority to direct, and is in the habit of directing, as

† 16 R. R. 214 (1 Madd. 269).

WILSON
v.
METCALFE.

well in an account of occupation rent, as in an account of rents and profits received. If a mortgagee, receiving the rents of a mortgaged estate, after his debt has been satisfied, does not immediately pay them over to the mortgagor, but retains them to his own use, he is availing himself of another man's money, and ought to be charged with interest. Is his situation substantially different, when he is in the actual occupation of the mortgaged premises? Though he is not in receipt of rent, he is, in fact, in receipt of profits; and these he keeps in his pocket. What the Master has done in fixing an occupation rent of these premises has merely been, to estimate the fair yearly rent which an occupier ought to pay for them; he does not consider what ought to be done in respect of the rent having been retained for many years by the actual occupier. The principle of the decision in *Quarrell v. Beckford* fully authorises the Court in directing annual rests to be made in this case.

[536]

It was said, that, if it were proper that annual rests should be made, a direction to that effect would have been found in some anterior order. It seems to me, that it was not thought convenient to give such a direction, till it was known when the mortgage debt was paid off. And my opinion is, that, in this stage of the cause, and under the circumstances appearing in this case, the Court ought now to direct annual rests against the mortgagees in possession from the time the mortgage money was paid off.

On the other hand, I apprehend that it is not now competent to me either to give costs against these defendants, or to deprive them of their costs. In *Quarrell v. Beckford*, the original decree (and it seems at that time to have been known that the mortgagee had been paid his mortgage money) directed the taxation of the costs of the defendant, but not their actual payment. When the cause came on for further directions, Sir THOMAS PLUMER thought that he was not at liberty to consider what ought to be done with any part of the costs, even of those costs which had been created by the improper or mistaken defence of the mortgagee; and that the direction to tax the defendant his costs of the suit, though unaccompanied by any direction as to payment, gave him those costs. My present impression is, that I am bound by the direction to tax the costs

of Ann Ness and her personal representatives, which is contained in the former decree.

WILSON
v.
METCALFE.

His Lordship did not afterwards express any alteration of opinion on the question concerning costs.

* * * * *

PLAYER v. FOXHALL.†

(1 Russell, 538—542.)

1826.

June 26, 29.

Rolls Court.
Lord
GIFFORD,
M.R.

[538]

The heir of the obligor in a bond, being one of two surviving executors of the obligee, is entitled to retain the amount of the bond out of the produce of the estate descended to him.

If, in a suit instituted by creditors, he accounts for the produce of the real estate in the Master's office, and he and his co-executor prove the bond debt under the decree, he is not entitled to retain.

RICHARD SAMUEL WHITE died intestate as to his real estate, and indebted in considerable sums both by specialty and simple contract.

Foxhall took out administration to him with his will annexed. The real estate descended to Richard Samuel White, his heir-at-law, who sold it and received the proceeds. Among the specialty debts of the intestate was a large sum due on bond to James Somerville Fownes and Richard Samuel White, the heir, as executors of John Curtis, the obligee of the bond.

The bill was filed by a specialty creditor of the testator against his administrator and heir, for the administration of the real and personal assets.

The heir, by his answer, stated, that he meant to apply the proceeds of the real estate in satisfaction of the specialty debts of the deceased: and he did not, upon the record, claim any right of retainer in respect of the bond of which he, as one of the executors of Curtis, was entitled to receive payment.

The usual decree being made, the heir was charged before the Master with the purchase-money of the real estate received by him, and with interest thereon, at 4 per cent. On the other hand, he and his co-executor proved the bond debt; interest was

† *Ferguson v. Gibson* (1872) L. R. 14 Eq. 379, 41 L. J. Ch. 640; *Ex parte Campbell* (1880) 16 Ch. D. 198.

PLAYER
v.
FOXHALL.

calculated on it at 5 per cent. up to the date of the report; and the sum, reported due in respect of it, was 4,880*l*.

The assets were found to be insufficient for the payment of the specialty debts in full.

[539]

The cause coming on for further directions, it was contended on behalf of White, the heir, that he, as one of the executors of Curtis, the obligee of the bond, was entitled to retain out of the proceeds of the real estate as much as would suffice to discharge the sum due on the bond.

Mr. Shadwell and *Mr. Roupell*, for the heir claiming to retain [cited *Loomes v. Stotherd*†].

Mr. Beames, contrà. * * *

June 29.

THE MASTER OF THE ROLLS :

[541]

Under the circumstances of this case the heir cannot be permitted to retain. The suit having been instituted *by a specialty creditor of the intestate against his personal representative and heir-at-law, the heir by his answer admitted that he was heir; that real estate of considerable value had descended upon him; that he had sold it; and that he meant to apply the proceeds in satisfaction of the specialty debts. But he did not claim to retain any debt in preference to the other creditors.

[*542]

The usual decree having been made, he went in before the Master as an accounting party; an account was taken against him of the produce of the real estate; and he consented to be charged with the sum which he had received in respect of it, with interest on it at 4 per cent. Still he did not claim to be entitled to retain any part of it. On the contrary, he and his co-executor proved their specialty debt before the Master; and interest at 5*l*. per cent. was calculated on it up to the date of the Master's report. That report has since been confirmed.

The heir having thus consented to be an accounting party for the whole proceeds of the real estate, not having set up any claim of retainer in due time, and having come in to prove the specialty debt under the decree; retainer cannot, in this stage of the proceeding, be allowed.

† 24 R. R. 209 (1 Sim. & St. 458).

HEATH *v.* DENDY.†

(1 Russell, 543—546.)

A testator, having by a post-nuptial settlement made certain provisions for his wife, which were expressed to be in bar of dower, bequeaths to her specific legacies, and a sum of money, adding that what he has so given her, together with the provision made for her by the settlement, shall be in lieu of any dower which she might claim; the assets having proved insufficient for the payment of the legacies in full, and there being real estate out of which the wife might have claimed dower: Held, that the wife is entitled to priority over the other legatees, and that the legacy given to her ought not to abate proportionally with the other legacies.

By an indenture made after the marriage of Richard Heath and Ann Heath, Richard Heath assigned a mortgage debt of 877*l.*, and a sum of 500*l.*, 5 per cent. Bank Annuities, to trustees, upon trust for himself during his life, and, after his decease, for his wife Ann Heath; and he also covenanted to surrender a copyhold tenement, which he had contracted to purchase, to trustees, to the use of himself for life, and, after his death, to the use of Ann Heath, her heirs and assigns.

The indenture contained a proviso, that the settlement thus made upon Ann Heath should be in bar and satisfaction of all claims which she might have against the real or personal estate of her husband, either in respect of dower or thirds, or under the Statute of Distribution, “save only what he should voluntarily give her by his last will and testament.”

Afterwards, Richard Heath, by his last will, bequeathed to his wife several specific articles, and a legacy of 1,200*l.*, to be paid to her within six months after his decease. “And my will is,” said the testator, “that what I have hereinbefore given to her, my said wife, together with the settlement or provision made upon or for her on our marriage, is in lieu and bar of all or any dower and thirds which she might otherwise be entitled to claim in, to, or out of any of my messuages, buildings, hereditaments, and premises, or personal estate, by the common law of England, or otherwise howsoever; and I hereby direct and require my said wife, if she shall be thereunto requested, or it shall be necessary so to do, *to release all such right, claim, estate, and interest accordingly.”

† *In re Greenwood*, '92, 2 Ch. 295, 61 L. J. Ch. 558.

1826.

July 3.

Rolls Court.

Lord

GIFFORD,

M. R. :

[543]

[*544]

HEATH
v.
DENDY.

The personal estate being insufficient for the payment of the testator's legacies in full, the executors insisted that the widow's legacy of 1,200*l.* ought to abate proportionally with the others. Upon this she filed her bill, offering to release her dower, and contending that, as the 1,200*l.* was bequeathed to her in lieu of benefits which the law gave her, she was entitled to have the whole of that sum paid to her in preference to the other legatees of her husband.

It was admitted that there was a part of Richard Heath's real estate, out of which she would have been entitled to dower.

Mr. Horne and Mr. Beames, for the plaintiff:

Burridge v. Bradyl,† *Blower v. Morret*,‡ and *Davenport v. Fletcher*,§ prove, that, when a legacy is given to a wife in lieu or satisfaction of dower, she is not, in case the assets should prove deficient, to abate in proportion with the other legatees. Here the testator has declared, that what he has given his wife is to be "in lieu or bar of her dower or thirds," and there is real estate of which she would be dowable, if she did not elect to take the benefits proffered to her, instead of her dower. Being thus not a mere volunteer, but a purchaser of the legacy by a relinquishment of her legal right, she is entitled to a preference over common legatees.

Mr. Shadwell and Mr. Tinney, contra :

[545]

The cases cited are not in point; for in none of them was there any settlement excluding the wife from her right of dower. Though the post-nuptial settlement made by Mr. Heath did not of itself bind the rights of the wife, yet if she, when *sui juris*, assented to it, and took what it gave her, she was that moment, and without regard to anything else, bound to release any right of dower which she might have. Thus there was nothing on which the condition imposed by the will could operate. If she assented to the settlement, she would have no right of dower, and would take the legacy as a mere volunteer; if she did not assent to the settlement, she could have no claim to the benefits given her by the will.

† 1 P. Wms. 127.

‡ 2 Ves. Sen. 420.

§ Ambler, 244.

Mr. Horne, in reply :

HEATH
v.
DENDY.

In the cases cited, the direction was, that the benefits given by the will should be in lieu of dower : here the testator directs that the benefits given by his will, together with the provision made by a settlement, which it was optional in the widow to adopt or reject, should be in lieu of dower. It can be of no importance whether the legacy is to constitute the whole or merely part of the compensation which is to be deemed an equivalent for the widow's legal rights. In either case she purchases the proffered compensation by the relinquishment of what the law entitles her to claim.

THE MASTER OF THE ROLLS :

My opinion is, that the widow is entitled to a preference over the other legatees. If, at the death of the testator, his widow had not been entitled to dower, the principle of the authorities which have been referred to would not have applied. But, at his death, her right to dower was in full force. The provision which the *post-nuptial settlement purported to make for her, was as much a gift which she might accept or refuse, as the benefits given her by the will. The direction of the testator is, that what he gives her by his will, together with the provision made for her by the settlement, shall be in bar of her dower and thirds, and that she shall release all her right or claim accordingly. For what was she to release her dower? Not merely for the provision which the settlement made, but for that provision taken in conjunction with the legacy. Thus the legacy was to be considered as a purchase of the dower. If it was not, as in *Blower v. Morret*, and *Davenport v. Fletcher*, the only consideration for it, yet it was part of the consideration ; and, therefore, the principle of those authorities applies to the present case. For it does not appear to me that the post-nuptial settlement, when its existence and nature are coupled with the language of the will, can vary the rights or situation of the widow, with respect to her legacy. It is not material whether the 1,200*l.* was or was not the whole of the consideration for the release of the dower ; if it was only part of the consideration, she is nevertheless a purchaser of the sum, and is entitled to priority over the other legatees.

[*546]

1826.
April 24, 25.
July 4.

Rolls Court.

Lord
GIFFORD,
M.R.

[547]

ATTORNEY-GENERAL *v.* THE CORPORATION OF STAFFORD AND LORD TALBOT.

(1 Russell, 547—548.)

Account of charity property decreed against a corporation from the time at which the accounts rendered by their answer commenced.

THIS was an information which called, among other things, for the due administration of certain property, consisting of tithes, vested in the Corporation of Stafford, on trust for charitable uses. They had received the income of the charity funds; and it was alleged, that they had employed large portions of them to purposes not warranted by the nature of the charity; such as contributing 1,000*l.* towards building the shire hall.

The MASTER OF THE ROLLS was clearly of opinion, that an account must be decreed against them.

The question then was, from what time the account ought to be decreed.

The Corporation had put in their answer in 1811; and in it they had rendered accounts which went back as far as 1791.

Mr. Horne, for the relators.

Mr. Heald and *Mr. Beames*, for the Corporation.

THE MASTER OF THE ROLLS :

[*548] In *The Attorney-General v. The Brewers' Company*,† Sir WILLIAM GRANT said, “that it was a point which had *never yet been decided, from what period a corporate body should be obliged to account in matters of trust; but that the original decree was clearly wrong, as no trustee can be held competent to say he will account only from the time at which a demand is made; and that to give the account only for six years, would be to create an analogy between a trust account and a common account.” And in that case he decreed an account from 1779,‡ which

† 1 Mer. 495, 498.

‡ 37 years.

was the time when the trust was created, the execution of which was prayed by the information. On the principle of that case, it must be admitted that the Court, in directing an account against this Corporation, ought not to stop either at the filing of the information, or at six years before that date. The Corporation have, by their schedules, rendered accounts which go back as far as 1791; and it is impossible to say that many questions may not arise with respect to the manner in which they have applied the sums appearing in the accounts so rendered. I ought to decree an account against the Corporation from 1791, the date at which the accounts, set forth in the schedules to their answer, begin.†

ATT.-GEN.
v.
CORPORATION OF
STAFFORD.

EILBECK v. WOOD.‡

(1 Russell, 564—574; S. C. 5 L. J. Ch. 61.)

1826.

July 5.

Aug. 14.

Rolls Court.
Lord
GIFFORD,
M.R.
[564]

By deed of 4th November, 1800 (being the settlement made on the marriage of A. and B.), the intended wife B., in exercise of a general power of appointment vested in her by a previous deed of the 4th of May, 1799, appointed certain freehold houses to the use of trustees, during the joint lives of herself and her husband, for her separate use, with remainder in the event of her dying in the lifetime of her husband (which happened) as she should appoint by will, attested by three witnesses, with limitations over. Shortly after her marriage, B., by will duly attested by three witnesses, devised the houses to her husband in fee; afterwards, in 1811, she and her husband executed a deed, attested by two witnesses, by which, after reciting the indenture of the 4th May, 1799, but not mentioning the marriage settlement, B., in exercise of the power given her by the deed of 1799, and of all other powers, &c. appointed the messuages to the use of her husband for life, remainder to the use of herself for life, remainder to the use of the children of the marriage as she should appoint, and, in default of appointment, to all the children equally in tail, with remainder to her husband in fee: Held, that the deed of 1811 did not operate as a revocation of the previous will.

By indentures of lease and release of the 3rd and 4th of May, 1799, and a recovery suffered in pursuance thereof, certain freehold messuages were limited to such uses, and upon such trusts, as Catherine Merriman, whether sole or married, and notwithstanding any coverture, by any deed or deeds, writing or

† See the report of *A.-G. v. Corporation of Exeter*, 2 Russell, 54, in 26 R. R.

‡ *Duguid v. Fraser* (1886) 31 Ch. D. 449, 55 L. J. Ch. 285.

EILBECK
v.
WOOD.

writings, with or without power of revocation, to be by her signed, sealed, and delivered in the presence of, and to be attested by two or more credible witnesses, should appoint; in default of such appointment, upon trust for the separate use of Catherine Merriman; and after her decease, to such uses and upon such trusts as she by will, attested by three or more witnesses, should appoint; and in default of appointment, to the use of all the children of Catherine Merriman in equal shares, as tenants in common in tail; with remainders over.

[*565]

By indenture, bearing date the 4th of November, 1800, being the settlement made on the marriage of Catherine Merriman and Beeby Eilbeck, the said Catherine, in exercise of the general power of appointment given to her by the indenture of the 4th of May, 1799, appointed the messuages comprised in it to the use of herself, her heirs and assigns, till the intended marriage should take place, and, after the solemnization thereof, to the use of trustees and their heirs during the joint lives of Beeby Eilbeck and herself, upon trust for her separate use, and in case *she should die in the lifetime of Beeby Eilbeck, her intended husband, then, after her decease, to such uses, upon such trusts, and for such intents, &c. as she, notwithstanding her intended coverture, by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, or any codicil or codicils thereto to be by her signed, sealed, published and declared in the presence of, and to be attested by, three or more credible witnesses, should direct or appoint; and, in default of such direction or appointment, to such uses, upon such trusts, and for such intents, &c. as, by the indenture of the 4th of May, 1799, were limited and expressed concerning the premises after the decease of the said Catherine, or such of them as should be then subsisting or capable of taking effect. But in case Beeby Eilbeck should die in the lifetime of the said Catherine, then to such uses, upon such trusts, and for such intents, &c. as she Catherine, by any deed or deeds, writing or writings, with or without power of revocation, to be by her signed, sealed, and delivered in the presence of, and to be attested by, two or more credible witnesses, should direct or appoint; and in default of such appoint-

ment, to the uses, trusts, intents, &c. expressed concerning the premises by the indenture of the 4th of May, 1799, or such of them as should be then subsisting or capable of taking effect.

EILBECK
v.
WOOD.

The marriage between Catherine Merriman and Beeby Eilbeck was solemnized. Shortly afterwards, by her will, bearing date the 24th of December, 1800, and duly attested by three witnesses, Catherine, in exercise of her power under the indenture of the 4th of November, 1800, devised the messuages comprised in it to her husband, Beeby Eilbeck, in fee.

Some years afterwards, by indenture bearing date the 8th of October, 1811, and made between and executed *by Beeby Eilbeck of the one part, and Catherine Eilbeck of the other part, which recited the indentures of the 3rd and 4th of May, 1799, so far as regards the general power of appointment thereby given to Catherine Eilbeck, but did not take any notice of the indenture of the 4th of November, 1800; it was witnessed, that she, Catherine Eilbeck, by virtue of the power and authority reserved to her by the said recited indenture, and by virtue of all other powers and authorities enabling her in that behalf, did limit, direct, and appoint that the said messuages should be and enure to the use of Beeby Eilbeck and his assigns during his life; after his decease, to the use of Catherine Eilbeck for her life; after her decease, to the use of all the children of Catherine Eilbeck by Beeby Eilbeck, as she should by deed appoint; and, in default of such appointment, to the use of all such children as tenants in common in tail; with remainder to Beeby Eilbeck in fee. This deed was attested by two witnesses only.

[*566]

Catherine Eilbeck afterwards died in the lifetime of her husband, Beeby Eilbeck.

It was admitted that the will of Catherine Eilbeck was a due execution of the power given to her by the marriage settlement, and that the deed of 1811 was not authorised by any power vested in Mrs. Eilbeck at the time she executed it, and was totally inoperative for the direct purpose for which it was made. But the question in the cause was, whether the deed amounted to a revocation of the will?

Mr. Sugden and Mr. Whitmarsh, for the plaintiffs :

* * The deed of October, 1811, * * clearly manifesting

[567]

EILBECK
 C.
 WOOD. an intention contrary to the previous intention which it was the object of the will to carry into effect, must be held a revocation of the will. * * *

[570] *Mr. Fonblanque and Mr. Swann*, for two of the defendants who were interested in supporting the will [cited *Ex parte the Earl of Ilchester* †]. There has been no decision since the Statute of Frauds, that an instrument, not attested by three witnesses, and not altering the testator's estate so as to effect an ademption, could operate as a revocation of his will. Indeed, such a decision would be a direct repeal of the statute. * * *

[571] The late case of *Matthews v. Venables*, ‡ also, is a direct authority against the plaintiffs. * * *

Mr. Sugden, in reply. * * *

Aug. 14. THE MASTER OF THE ROLLS,

[572] After stating the circumstances, and that he had looked through all the authorities, observed that the case was one of so much nicety, and at the same time of such importance, that he should not think himself justified in deciding it without first taking the opinion of a court of law. In 1811, Mrs. Eilbeck had no power to appoint by deed, if she died in the lifetime of her husband. The appointment *made in 1811, therefore, was perfectly inoperative from the commencement; and the question was, whether, though inoperative as an appointment, it could be considered as a revocation of the previous will? On the one hand, the cases mentioned by Lord ALVANLEY in *Ex parte the Earl of Ilchester*, in which a bargain and sale without enrolment, and a feoffment without livery, have been held revocations, and some other authorities of an analogous kind, have been cited as favourable to the doctrine that there has been a revocation. Reliance, too, is placed on the *dictum* of Lord KENYON in *Shore v. Pincke*, where he says, § “Even supposing the deed was an inadequate conveyance for the purpose for which it was intended, still, if it demonstrate an intention to revoke the will, it amounts in point of law to a revocation.” The circumstances of that case, however, did not call for an actual determination on

† 6 R. R. 139 (7 Ves. 348).

‡ 2 Bing. 136.

§ 5 T. R. 129.

the point; and the decision there seems to have proceeded on the ground that the deed on which the question arose was not an inoperative instrument. On the other hand, in the late case of *Matthews v. Venables* it was held, that an instrument, void as a deed, could not operate as a revocation of a prior will. His Lordship, as he thought that a case should be sent to a court of law, refrained from intimating what his own opinion was.

EILBECK
v.
WOOD.

A case was sent to the Court of King's Bench.

The case, after setting forth the different instruments, and stating that it was admitted that the will of Catherine Eilbeck was a due execution of the power given to her by the marriage settlement, and that no estate or interest passed by the deed of the 8th of October, 1811, submitted the following question to the Court:

Whether the indenture of the 8th day of October, 1811, operated as a revocation of the will of Catherine Eilbeck, bearing date the 24th day of December, 1800?

[574]

The four Judges of the Court of King's Bench certified that the indenture of the 8th of October, 1811, did not operate as a revocation of the will.

The cause coming on for further directions before the Master of the Rolls,† the certificate of the Court of King's Bench was confirmed without argument, and without opposition from any of the parties to the suit.

1827.
July 6.

† Sir John Leach.

1824.

Feb. 1, 19, 20.
July 27.LEACH, V.-C.
[1]BARFIELD *v.* NICHOLSON.

(2 Sim. & St. 1—10; S. C. 2 L. J. Ch. 90.)

Copyright may be either in respect of the matter or the arrangement; but no property can be acquired in an article copied from a prior work.

An author having sold the copyright of a work published under his own name, and covenanted with the purchaser not to publish any other work to prejudice the sale of it; another publisher, who had no notice of this covenant, will be restrained from publishing a work subsequently purchased by him from the same author, and published under his name, on the same subject, but under a different title, though there be no piracy of the first work.

THIS was a bill to restrain the defendants from printing and publishing a work intitled "The Practical Builder," or any other work prejudicial to the sale of "The Architectural Dictionary," a work belonging to the plaintiff.

[2]

The defendant Nicholson having written a work called "The Architectural Dictionary," by an indenture dated the 3rd of March, 1821, made between him of the one part, and the plaintiff of the other part, in consideration of the sum of 250*l.* sold and assigned to the *plaintiff all his copyright in the work; and by the same indenture he for himself, his executors and administrators, covenanted, promised and agreed, to and with the plaintiff, his executors, administrators and assigns, that he would not write or publish, or cause or procure to be written or published, any abridgment of that work, or any part thereof, or any other kind of publication, which might prove prejudicial or detrimental to the sale of "The Architectural Dictionary," and that he would not in any manner, either directly or indirectly, impede the circulation or publication thereof.

The bill, after stating this indictment, alleged that Nicholson, in violation of his covenant, had, in July, 1823, prepared and written a work, called "The Practical Builder," which contained, in substance, the greatest part of the information comprised in "The Architectural Dictionary," and had also introduced into it many of the designs and plans, and a part of the substance of the letter-press of "The Architectural Dictionary." It also stated, that the defendant, Kelly, who was a bookseller,

had printed, published and sold many thousand copies of "The Practical Builder," under the direction of Nicholson; and that Nicholson and Kelly were joint-owners and proprietors of "The Practical Builder." The plaintiff stated himself to be the sole owner of the copyright of "The Architectural Dictionary."

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v.
NICHOLSON.

The bill charged that many of the plans and designs in the plates of "The Architectural Dictionary" were original, and had never been published in any other work; and that Nicholson had introduced into "The Practical Builder," and had printed and published in that work, a great number of these original plans and designs; and had even acknowledged that the substance of the letter-press of "The Practical Builder" was the same as that of "The Architectural Dictionary:" that the plaintiff had, previously to that publication, derived great profits from the sale of "The Architectural Dictionary," but that the sale of that work had been greatly injured by the publication of "The Practical Builder."

[*3]

Soon after the bill was filed, the Court was moved, on the part of the plaintiff, for an injunction to restrain the publication, "The Practical Builder." In support of this motion, an affidavit was filed by the plaintiff to the truth of the allegations in the bill. There were also affidavits of an architectural bookseller and a builder in support of the plaintiff's case, stating that they had compared certain plates in "The Practical Builder," specified in the affidavits, with the plates in "The Architectural Dictionary," and that, in their judgment, the designs and plans contained in the plates in "The Practical Builder" were similar to and copied from the corresponding designs and plans in "The Architectural Dictionary;" and that, although many of them varied slightly, yet that they were substantially the same, conveying the same information, and illustrating the same subjects; that "The Practical Builder" purported to give information on the same subjects, and was written on the same principle, and, in many cases, copied from "The Architectural Dictionary," and was calculated altogether to supersede that work.

On this motion, the VICE-CHANCELLOR granted an injunction *ex parte*; observing, that the covenant by *Nicholson, in the deed of 1821, was, *prima facie*, sufficient to entitle the plaintiff to

[*4]

BARFIELD
v.
NICHOLSON. an injunction *ex parte*, without entering into the question of piracy.

The defendants afterwards put in their answers. The answer of Kelly stated that "The Architectural Dictionary," when first published, was not an original work, either in its letter-press or plates, though it might contain some original letter-press, designs and plates; but that the original matter formed a very small portion of the whole work; that, until this bill was filed, he was wholly unacquainted with the arrangement between the plaintiff and Nicholson, and with the deed of 1821; that, in the beginning of 1821, he, being a publisher and bookseller in extensive business, for his own sole and exclusive benefit planned the work or publication called "The Practical Builder;" that the defendant Nicholson, being an architect of great eminence, in consequence of the reputation which he had acquired by various publications on carpentry and architecture, he was induced to employ him occasionally in the composition of "The Practical Builder," and to apply to him to use his name as the author of the work, although, in fact, he was only occasionally employed to write some parts of it, and to design some of the figures; but that he (Kelly) employed other men of science to write the residue of the letter-press, and employed Michael Angelo Nicholson, (the son of the defendant Nicholson,) to design the residue of the figures; and that, of the forty-six plates already published, M. A. Nicholson had designed twenty-two, and the defendant, Nicholson, twenty-four; and that the whole of these designs were brought to and paid for by him (Kelly) as original designs, and that the original drawings of the designs, so brought to him,

[*5] *were still in his possession, ready to be produced; that, since this bill was filed, he had been induced to inquire as to the originality of these designs, and found that many of them were not original, but taken from works published many years ago, the copyright in which had long since expired, or from works in common circulation, without any objection on the part of the owners of such works; but that not one of the designs or drawings was copied from the designs and drawings of "The Architectural Dictionary," although, on a casual inspection, a great imitation appeared between some of these designs and drawings

and those contained in "The Architectural Dictionary;" but that this similarity arose from the nature of the subject, and not from their being copied; that every one of the plates and figures, and the letter-press, which the affidavits of the plaintiff stated to be piracies from "The Architectural Dictionary," had, in fact, appeared in prior works; and he denied, to the best of his knowledge, judgment and belief, that any passage in his work was a piracy of, or copied from the plaintiff's work; but, on the contrary, that "The Practical Builder" was, so far as the subject would admit, an original work. The answer also denied that Nicholson was a joint-owner in "The Practical Builder," or in any manner interested in the produce or profits of it, and, therefore, denied that the publication of that work was a breach or violation of the covenant between the plaintiff and Nicholson.

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NICHOLSON.

The defendant Kelly having put in this answer, the Court was now moved, on his behalf, to dissolve the injunction as against him.

Mr. Solicitor-General, and Mr. Wakefield, for the motion.

Mr. Heald, Mr. Sugden, and Mr. Roots, for the plaintiff, contra. [6]

THE VICE-CHANCELLOR:

"The Architectural Dictionary," and "The Practical Builder," are plainly both works upon the same subjects, namely, the science of architecture and the art of building. The question is, whether the latter work is a piracy upon any part of the former work which the author of that work had a right to claim as his own property, in respect that it was his own composition.

Composition is either in new matter or new arrangement. The arrangement in the two works is altogether different. In "The Architectural Dictionary" the information is scattered through the whole work, under the head of each particular term of science or art, arranged in alphabetical order: in "The Practical Builder" the information is conveyed in the connected form of a treatise. If there be piracy here, it must be piracy of

BARFIELD
v.
NICHOLSON. the matter of "The Architectural Dictionary." The general answer of the defendant is, that "The Practical Builder" was conceived and planned by him as a speculation on his own account, and that he employed various artists in the execution of this work, and, among others, Nicholson and his son; and especially in the plates; and that he paid for everything as original design; and that, if it be a piracy, he is himself imposed upon.

[*7]

"The Practical Builder," as far as published, consists of forty-six plates; and the affidavits allege that thirteen of these plates contain one, two, three or four figures, which are imitations of figures contained in "The Architectural Dictionary;" and the particular figures *are pointed out in the affidavits. The entire resemblance of these figures, though in some instances denied, is generally admitted; but it is said this resemblance is no proof of imitation. The figures of geometry must necessarily resemble each other in all works: and, in a great degree, this applies to the figures of architecture or building, where they are descriptions of things in use, as, for instance, in one of the articles, "Roofs." Where two works describe the figures of roofs in use, they must necessarily produce resembling figures. And the defendant then proceeds to shew, that the figures used in his plates, supplied by the Nicholsons, are not, in fact, piratical copies of the plaintiff's work. The defendant does not deny (what could not be denied) that if the Nicholsons, whom he employed, piratically copied these figures from the plaintiff's works, that he is bound by their acts, as the acts of his agents, and that piracy in the Nicholsons is piracy in him.

As to those figures in which he admits resemblance, he says there is not one of them which was not given to the public in some or many works prior to "The Architectural Dictionary;" that some of these prior works were the works of Nicholson himself, as the articles of architecture in "Rees's Cyclopaedia," and the same articles in "Brewster's Encyclopedia," and "The Carpenter's Guide," published in 1792. And he says further, that not only were these figures extant prior to "The Architectural Dictionary," but that the Nicholsons had not in fact recourse to "The Architectural Dictionary" for them, nor to

any materials collected for "The Architectural Dictionary." BARFIELD
 Upon reference to the prior publications, it is proved to be NICHOLSON.
 indisputably true that there is not one of these figures which
 had not been given to the world *prior to "The Architectural [*8]
 Dictionary;" and, the matter not being new, the author of
 "The Architectural Dictionary" could acquire no property in
 these figures except by a new arrangement; but there is clearly
 no novelty in his arrangement. The figures of "The Archi-
 tectural Dictionary" are introduced to illustrate the letter-press;
 and so are all figures in prior works, as well as in "The Practical
 Builder."

If therefore the figures furnished by Nicholson for "The Prac-
 tical Builder" had in fact been copied from "The Architectural
 Dictionary," this would have been no piracy, because the author
 of "The Architectural Dictionary" had no property in these
 figures. But the Nicholsons, both father and son, positively
 swear that these figures were not copied from "The Architectural
 Dictionary," nor from any materials collected for "The Archi-
 tectural Dictionary."

With respect to the letter-press, the affidavits filed by the
 plaintiff do not point out particular instances of invasion; but
 upon the motion, I was referred to the article "Roofs," which
 is nearly a *verbatim* copy of the same article in "The Archi-
 tectural Dictionary." The defendant's answer here is the same
 as to the figures. This article was published *verbatim* in the
 encyclopedia prior to "The Architectural Dictionary," and is
 not therefore the property of the plaintiff.

Let the injunction be dissolved against Kelly; but the plaintiff
 being desirous to try this case at law, and undertaking imme-
 diately to bring an action against Kelly, let Kelly in the mean-
 time keep an account of the copies sold by him.

The plaintiff appealed to the LORD CHANCELLOR against this [9]
 last order. The case was argued for several days, and his
 Lordship ultimately pronounced the following order :

"His Lordship doth order, that an injunction be awarded to
 restrain the defendant, Thomas Kelly, from *publishing or
 selling, in the name of Peter Nicholson, the book or work in
 July 27.
 [*10]

BARFIELD v. NICHOLSON. the pleadings mentioned, called 'The Practical Builder,' or any parts or part, or numbers or number thereof; and also from employing the defendant, Peter Nicholson, from [in] writing any part of the letter-press, or designing any of the plates of the said book or work, called 'The Practical Builder,' and that the defendant, Thomas Kelly, be also restrained from publishing or selling, in the name of Peter Nicholson, any part of the said book or work, called 'The Practical Builder,' printed or engraved since the filing of the plaintiff's bill in this cause, which has been written or designed by the defendant, Peter Nicholson, until the hearing of this cause, or until the farther order of the Court."—Reg. Lib. A. 1823, f. 1921.

1824.

May 9, 10, 11.

LEACH, V.-C.

[41]

LORD SELSEY v. RHOADES.

(2 Sim. & St. 41—55; affirmed 1 Bligh (N. S.), 1—8.)

Bill to set aside the lease of a farm granted to a steward by his employer, dismissed, with costs; it appearing that the rent to be paid by the steward had been fixed by a surveyor named for that purpose by the employer, and on a valuation made in the manner usual with that surveyor; and the offer of a higher rent being known to the employer before he executed the lease.

THIS was a bill to set aside, as fraudulent, a lease of a farm, which had been granted many years ago by James Lord Selsey, the grandfather of the plaintiff, to the defendant, who was his steward and confidential agent.

[The VICE-CHANCELLOR's decision dismissing the bill was affirmed on appeal by the House of Lords, as reported in 1 Bligh (N. S.), p. 1, to be contained in a later volume of the Revised Reports, but it will be convenient to preserve here the following passage from the VICE-CHANCELLOR's judgment:]

[49] THE VICE-CHANCELLOR:

In this case, it is necessary to explain clearly the principles upon which my judgment proceeds.

There is no rule of policy which prevents a steward from

being a lessee under his employer. There is no rule of policy which prevents a steward from receiving from the bounty of his employer a beneficial lease. But where the transaction proceeds, not upon motives of bounty, but upon contract, there the steward is bound to make out that he gives the full consideration which it would have been his duty as steward to obtain *from a stranger; and, where the transaction is mixed with motives of bounty, there the steward is bound to make out that the employer was fully informed of every circumstance respecting the property which either was within the knowledge of the steward, or ought to have been within his knowledge, which could tend to demonstrate the value of the property and the precise measure and extent of the bounty of the employer.

These doctrines may be considered as comprised in the general maxim, that a steward dealing with his employer shall derive no advantage from his situation as steward. The employer may, if he pleases, treat with his steward preferably to any other person; and this preference is a bounty. But the steward cannot take advantage of this preference, unless he fully imparts to his employer all the circumstances of existing competition.

* * * * *

MITCHELL v. HAYNE.

(2 Sim. & St. 63—64.)

If an action is brought against an auctioneer for a deposit, he cannot file a bill of interpleader, if he insists upon retaining either his commission or the duty.

THE plaintiff was an auctioneer, and had sold an estate for one of the defendants. The other defendant was the purchaser, and had commenced an action against the plaintiff for the deposit; upon which the plaintiff filed a bill of interpleader against him and the vendor, and prayed for an injunction to restrain the action.

Mr. Agar and *Mr. Crombie*, for the plaintiff, now moved

LORD SELSEY
v.
RHOADES.

[*50]

1824.

May 28.

LEACH, V.-C.

[63]

MITCHELL for the injunction, and offered to pay the deposit money into
 v.
 HAYNE Court, after deducting the duty and commission.

Mr. Koe, for the purchaser, opposed the motion.

THE VICE-CHANCELLOR :

Interpleader is where the plaintiff is the holder of a stake which is equally contested by the defendants, as to which the plaintiff is wholly indifferent between the parties, and the right to which will be fully settled by interpleader between the defendants. That is not this case. The plaintiff receives a deposit of 87*l.* 18*s.* 9*d.*, and claims, against both the defendants, to retain 27*l.* 16*s.* 10*d.* for his commission and the auction duty. And, by this motion, the plaintiff calls upon the defendants to interplead for the sum of 60*l.* 1*s.* 11*d.*, which he desires to pay into Court. But the bill itself states that the action which is threatened by the defendant, the purchaser, is for the *whole deposit of 87*l.* 18*s.* 9*d.*, and not for the sum of 60*l.* 1*s.* 11*d.* only, which is all that the defendant, the vendor, could claim. The plaintiff is not, therefore, an indifferent stakeholder, but has a personal question to maintain with the defendant, the purchaser; and, if he seeks an injunction, must obtain it, not upon the principle of interpleader, but upon an order for time, or upon the answer.

[*64]

THE ATTORNEY-GENERAL *v.* HEELIS.†

(2 Sim. & St. 67—78; S. C. 2 L. J. Ch. 189.)

1824.
June 23.

LEACH, V.-C.

[67]

Where a common was inclosed under an Act of Parliament passed with the consent of the proprietors, and was vested in Commissioners, upon trust to apply the rents for the improvement of a town, with power to them to levy a rate on the inhabitants in case the rents proved deficient, an information and bill being filed by some of the inhabitants, on behalf of themselves and the others, against the Commissioners, for an account of the rents, alleging misapplication, and that a rate levied was unnecessary: Held, on general demurrer, 1st, that the funds constituted a charity; and 2nd, that the object of the suit being to avoid the rate, the plaintiffs had a right to sue on behalf of themselves and the other inhabitants.

Funds supplied from the gift of the Crown or of the Legislature, or of private persons, for any legal public or general purpose, are charitable funds, to be administered by courts of equity.

THIS was an information and bill, in which ten persons were the relators and plaintiffs, on behalf of themselves and all the other tenants and occupiers of houses and other premises situate in Great Bolton, in the county of Lancaster, subject to the rates or assessments, and entitled to the benefit of the Acts of Parliament after mentioned. The defendants were the trustees under those Acts of Parliament.

An Act of Parliament was passed in the 32nd Geo. III., with the consent of the lords and proprietors of the common called Bolton Moor, for inclosing that common, and widening, paving, lighting, watching, cleansing, and regulating the streets of Great Bolton and Little Bolton, and supplying those towns with water, and with fire-engines, and hackney coaches and chairs. The Act appointed certain Commissioners and Trustees for effectuating the purposes of the Act, and directed them after setting out highways, and making certain allotments, to set out all the remainder of Bolton Moor in lots, and to sell and demise them for a term of five thousand years, reserving a rent, subject to the immediate payment of 10*l.* an acre, and out of the money to be produced thereby to defray two-thirds *of the expense of passing the Act,

[*68]

† Observations are made upon this case by Lord ELDON in *Attorney-General v. Mayor of Dublin* (1827) 1 Bligh (N. S.), 312, 334; and see *St. Botolph without Bishopsgate Parish*

Estates (1887) 35 Ch. D. 142; *Re Christchurch Inclosure Act* (1888) 38 Ch. Div. 520, 531; '93, A. C. 1; 57 L. J. Ch. 564.—O. A. S.

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and the expenses of the Commissioners, and to pay the residue into the hands of a treasurer, to be appointed by the Trustees, for the uses after mentioned. And it enacted, that the clerk of the Trustees should cause regular entries of the proceedings of the Trustees to be made in books to be kept for that purpose, and that such entries should be evidence in all Courts, and the books to be open to the inspection of all persons who should be taxed and assessed for the purposes of the Act. The Act also empowered the Trustees to put up lamp-posts and irons in the towns of Great and Little Bolton, and to contract for paving, lighting, and cleansing the streets of those towns, and for conveying water thereto, and for appointing watchmen, and to build and provide a house and offices for the use of the peace officers of those towns, and to make sewers and drains. And it enacted that whenever the monies coming to the hands of the Trustees for Great Bolton, from the lands and grounds thereinbefore directed to be sold, should be insufficient to defray the costs, charges, and expenses of carrying into execution the purposes of that Act within the town of Great Bolton, then and in every such case, but not otherwise, it should be lawful for the said Trustees, once in every year, or oftener as occasion should require, to ascertain the sum or sums of money to be raised by rates or assessments on the several inhabitants of the town for the purposes aforesaid, and to raise thereby such sum or sums of money, from time to time, not exceeding in the whole the sum of two shillings and sixpence in the pound in any one year, upon the several tenants and occupiers of all messuages, houses, warehouses, &c. within the town of Great Bolton; and power was thereby given to levy these rates and assessments by distress.

[*69]

*The Act also contained a power to the Trustees to borrow money at interest, or by way of annuity, upon the credit of the rents, rates, and assessments before mentioned, the sums so borrowed to be applied only for the purposes of the Act. It likewise provided that if the rents arising from the allotments of the land should be more than sufficient to defray the expenses of executing the purposes of the Act in the town of Great Bolton, and there should be no money due on mortgage or annuity, on the credit of the rents, rates, and assessments, in every such

case the overplus remaining in the hands of the Trustees on the 29th of September in every year should be by them paid over to the overseers of the poor of the town of Great Bolton, for the time being, to be by them applied in the same manner as the rates for the relief of the poor within the town. The Act contained a clause enabling the Commissioners to sue and be sued in the name of their secretary; and also a clause giving jurisdiction to the Duchy Court of Lancaster as to all matters of a civil nature relating to the purposes of the Act.

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Another Act for granting further power for improving the town of Great Bolton was passed in the 57th Geo. III. By this Act further powers were granted to the Trustees appointed under the former Act, enabling them to re-sell certain lots of Bolton Moor, for the purposes of the Act; and it was enacted, that no person should act in the capacities both of clerk and treasurer; and that the Trustees should cause a book to be kept by their clerk, in which such clerk should enter a regular account of all sums of money paid and received on account of the two Acts of Parliament, and for what the sums *were paid, which was to be open to the inspection of any person who should pay to any rate or assessment to be made under the Act; and all such persons were to be at liberty to take copies thereof and inspect them.

[*70]

After setting forth these Acts, the information and bill stated, that the Commissioners and the Trustees had proceeded to allot and dispose of Bolton Moor, and had paid over into the hands of their treasurer large sums of money produced from that source; but had expended these sums in a manner which the plaintiffs could not discover; and had not applied them for the purposes required by the Acts of Parliament: that the sums received for rents of the allotments were very large, and were sufficient for the purposes of the Act, without borrowing any money or levying any rate; but that no accounts had been kept or entered in books according to the directions of the Act of Parliament: that the defendants had refused to allow the plaintiffs to inspect their books, and that the clerk of the defendants had, under their directions, refused such inspection: that the defendants had misapplied the funds received under the Acts of Parliament, and had alleged that the funds received from the rents were insufficient for the

ATT.-GEN. purposes of the Act, and imposed upon the inhabitants of Great
 v. Bolton a rate of sixpence in the pound under the powers conferred by the Acts, and had issued warrants of distress to levy
 HEELIS. this rate.

[*71] The information and bill charged that no rate was necessary ; that this was the first rate which had been imposed under the authority of the Act, and that it had been imposed by a very small majority of the Trustees, and since it had been imposed that several of the Trustees *had declared that no such rate was necessary. It therefore required the Trustees to discover how the funds had been applied by them, and insisted that, under the circumstances mentioned, the defendants should be prevented from enforcing the rate, and charged that they had no other means of preventing the warrants of distress for levying the rate from being executed, but by the interference of this Court.

The prayer was, that the trust funds vested in the defendants might be administered under the direction of the Court : that an account might be taken of all the estates, rents, and property vested in the defendants under the Acts of Parliament set forth in the information, so far as those Acts related to the town of Great Bolton ; and also an account of all payments duly made by the defendants ; and that it might be declared that the defendants were personally liable to pay, and might be decreed to pay what should be found, upon taking the accounts, to have been improperly expended by them ; and that it might be declared that the rate or assessment mentioned in the information ought not to be raised, and ought to be quashed ; and that the defendants might be restrained by injunction from issuing any warrants of distress for levying the rate.

To this information and bill the defendants put in a general demurrer for want of equity.

Mr. Horne and Mr. Pemberton, for the demurrer :

[72] * * Upon the present case it must be decided, whether any five or six paupers in a town have the right to institute a suit on behalf of themselves and the people of the town, against all the principal inhabitants, touching any assessments for local and public purposes ?

The funds in this case are not a public charity: *Attorney-General v. Brown*.† * * *

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HEELIS.

Mr. Hart and Mr. Spence, for the relators and plaintiffs:

[73]

* * This must be held to be a general charitable institution, in which all the inhabitants of the town of Great Bolton are interested: *Howse v. Chapman*.‡ * * Here there was a general dedication of the property, which, though it flowed from the parish at large, was as much a charitable *institution as if it proceeded from one individual. * * *

[*74]

Mr. Pemberton in reply. * * *

[75]

THE VICE-CHANCELLOR :

This is an information and bill by the *Attorney-General* and certain persons, on behalf of themselves and all others, who are assessed to a rate made under the authority of the defendants, insisting that the defendants are in effect trustees for certain charitable purposes, with power to make the rate in question only in case the charitable funds are insufficient, and that the charitable funds are ample for the purposes required; and praying, therefore, amongst other things, an account of the charitable funds, and of the application thereof by the defendants, and that in the meantime the defendants may be restrained from enforcing the payment of the rate so made by them. To this bill the defendants have put in a general demurrer, and the first point made by them is, that the plaintiffs to the bill have not a right to sue on behalf of all other persons on whom the rate in question is assessed; and a late case of *Jones v. Del Rio*, before the Lord Chancellor, is cited as an authority for that proposition. There the plaintiff, being one of the subscribers to the Peruvian Loan, filed a bill on behalf of himself and all other subscribers to that loan, to rescind the contracts of subscription, and to have the subscription monies returned. The LORD CHANCELLOR held that the plaintiff was not entitled in that case to represent all others the subscribers, for that it did not necessarily follow that every subscriber should, like the plaintiff, wish to retire from the

[*76]

† 1 Swanst. 265. See note next page.

‡ 4 R. R. 292 (4 Ves. 542).

ATT-GEN. speculation, and that every individual must judge for himself
 c. in that respect. The principle of that case has no applica-
 HEELIS. tion here. The object of the bill is to avoid the payment of
 the assessment in question, and every individual assessed has in
 that respect one common interest.

The next and most important point made by the defendants is, that this is not a case in which a court of equity has jurisdiction to compel an account. It must be admitted that a court of equity has, in this case, no authority to compel an account, unless the funds in question are charitable funds. In the case of the *Attorney-General v. Brown*,† which has been much referred to in the argument, I had occasion to consider this sort of subject very fully. I am of opinion, that funds supplied from the gift of the Crown, or from the gift of the Legislature, or from private gift, for any legal, public, or general purpose, are charitable funds to be administered by courts of equity. It is not material that the particular public or general purpose is not expressed in the statute of Elizabeth, all other legal, public, or general purposes being within the equity of that statute. Thus, a gift to maintain a preaching minister; a gift to build a sessions house for a county; a gift by Parliament of a duty on coal imported into London, for the purpose of rebuilding *St. Paul's Church after the fire in London; have all been held to be charitable uses within the equity of the statute of Elizabeth.

[*77]

I am of opinion that it is the source from whence the funds are derived, and not the mere purpose to which they are dedicated, which constitutes the use charitable;‡ and that funds derived from the gift of the Crown, or the gift of the Legislature, or from private gift, for paving, lighting, cleansing, and improving a town, are, within the equity of the statute of Elizabeth, charitable funds to be administered by this Court. But where an Act of Parliament passes for paving, lighting, cleansing, and improving a town, to be paid for wholly by rates or assessments

† Reported on appeal to the Lord Chancellor, in 1 Swanston, 265—308. A further appeal to the House of Lords was compromised before the hearing.—O. A. S.

‡ This opinion can scarcely be

maintained at the present day. See the cases cited to the contrary by NORTH, J. in *St. Botolph Parish Estates* (1887) 35 Ch. D. 142, at p. 150.—O. A. S.

to be levied upon the inhabitants of that town, the funds so raised, being in no sense derived from bounty or charity, in the most extensive sense of that word, are not charitable funds to be administered by this Court.

To apply these principles to this case. The funds vested in the Trustees to be in the first place applied in the improvement of the town of Great Bolton, are the purchase-monies, rents, and profits of a certain part of Bolton Moor, which the Commissioners are by the Act of Parliament authorised to sell for a term of five thousand years, reserving a rent. Before the passing of this Act, Bolton Moor was the property of the lords of the manor of Bolton, and of certain persons, owners, and proprietors of certain lands, messuages, and tenements within the said manor, who had rights of common on the moor. The Act of Parliament, with the consent of the lords and persons having rights of common on the moor, dedicates the property of a very large part of this moor to the improvement of the town of Great Bolton. This is, in effect, a gift by the lords and persons having rights *of common for the public purpose of improving the town, and the funds given are therefore charitable funds to be administered by this Court.

It was said that the defendants, the Trustees, do not, under the provisions of the statute, possess these funds, and are not therefore to account for them: that the treasurer alone possesses them. Upon looking into the provisions of the statute, in this respect, I am of opinion that the Trustees do possess, and administer these funds, and are accountable for them, and that the treasurer is merely their servant.

Let the demurrer be overruled.

ATT.-GEN.
v.
HEELIS.

[*78]

1824.

June 25.

LEACH, V.-C.

[78]

HALL v. BENNETT.†

(2 Sim. & St. 78—79.)

A bill filed by a solicitor on instructions furnished by the brother-in-law of the plaintiff, without any communication with the plaintiff himself, being dismissed with costs, the solicitor was ordered to pay the costs, it appearing that the plaintiff had absconded before the bill was filed.

THE bill in this case had been dismissed with costs for want of prosecution.

The Court was moved on behalf of Feavor and Marshall, two of the defendants, that the solicitor, who had filed the bill for the plaintiffs, might pay the defendants their taxed costs, on the ground that the plaintiff had absconded eight years before the bill was filed; and that the solicitor, who filed it, never had any communication with him, and did not receive his instructions from him, but from his brother-in-law.

[79]

Mr. Pemberton, for the motion. * * *

Mr. Horne, for the solicitor, opposed the motion.

The VICE-CHANCELLOR ordered the solicitor to pay the costs.—
Reg. Lib. A. 1823, f. 1770.

1824.

June 30.

LEACH, V.-C.

[87]

MARSH v. WELLS.

(2 Sim. & St. 87—90; S. C. 2 L. J. Ch. 194.)

The reversioner of leaseholds, with the privity of the tenant for life, renewed the lease in his own name, and covenanted to repair the premises: Held, that he was to be considered as having entered into the covenant on behalf of the tenant for life, and that the latter's estate was liable for dilapidations occasioned by his neglecting to repair.

ELIZABETH BAYNARD by her will gave her freehold and leasehold estates, the latter of which she held under a lease for twenty-one years from the Dean and Chapter of Rochester, to William Pemble and Rachael his wife, for their lives, and the

† *Cape Breton Co. v. Fenn* (1881) *Schjott v. Schjott* (1881) 19 Ch. Div. 17 Ch. Div. 198; 50 L. J. Ch. 321; 94; 51 L. J. Ch. 368.

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v.
WELLS.

life of the survivor of them ; and she gave all her estate, both freehold and personal, to George Marsh, the plaintiff's father, his heirs, executors, administrators and assigns, and appointed him and the plaintiff executors of her will. The testatrix died in the year 1797. Upon her decease William Pemble entered into the possession of the freehold and leasehold estates, and continued in such possession until his decease. In the year 1798, seven years of the term of twenty-one years being expired, a renewed lease was, with Pemble's consent, taken in the names of the plaintiff and his father. In 1800, the plaintiff's father died, having devised and bequeathed all his real and personal estate to the plaintiff, and appointed him his executor. In the years 1805, 1812, and 1819, renewed leases were taken, with Pemble's consent, in the plaintiff's name, and the plaintiff covenanted *to keep the buildings and fences on the premises in repair. Upon every renewal, Pemble and the plaintiff paid the fine, in certain proportions agreed upon between them. In 1823 Pemble died intestate: the defendants were his administrators.

[*88]

Some years before his decease the plaintiff had informed him, by letter, that he expected the freehold estate to be kept in proper tenantable repair, and requested him to consider that communication as due notice thereof. Pemble's solicitor answered this letter, and said that Pemble accepted it as legal notice respecting the repairs of the freehold estate, and would give due attention to it; but, notwithstanding, both the freehold and leasehold estates were, at Pemble's decease, in a dilapidated state. In consequence of this, a meeting took place between the plaintiff and the defendants, at which a surveyor was appointed on each side to ascertain the expense of making the necessary repairs, with power to them to appoint an umpire. The surveyors accordingly appointed an umpire, but, before any survey was made, the defendants revoked the authority given to their surveyor and the umpire, upon which the plaintiff's surveyor and the umpire proceeded to survey the buildings and fences, and estimated the expense of the repairs at 630*l.* 10*s.* and made a report to that effect.

The bill, after stating as above, prayed that it might be declared, that the plaintiff was entitled to a compensation out of

MARSH
v.
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Pemble's personal estate, for the repairs which Pemble ought to have done upon the freehold and leasehold estates, and that it might be referred to the Master to inquire and state what sums would be necessary for putting the estates into a tenantable and proper state *of repair, and that such sums might be ordered to be paid to the plaintiff out of Pemble's personal estate.

[*89]

To this bill the defendants put in a general demurrer for want of equity.

Mr. Koe, in support of the demurrer :

* * This is a mere case of permissive waste : * *
Lansdowne v. Lansdowne.† It was optional on the part of the plaintiff to take the renewed leases. He could not have compelled the tenant for life to take them : but he considered the renewing of the leases to be for his own benefit.

Mr. Sugden and *Mr. Wilbraham*, in support of the bill :

The plaintiff in this case was, during the life of the tenant for life, a trustee only. The rents were received by the tenant for life. The plaintiff, upon taking the renewals, entered into onerous covenants to perform certain obligations, not for the benefit of himself alone, but for the benefit and with the privity of the tenant for life. Those covenants were broken during the possession of the tenant for life. * * *

[90]

THE VICE-CHANCELLOR :

The plaintiff, during the life of W. Pemble, was, in effect, the trustee of these premises for W. Pemble, and was so constituted by his consent. The covenant of the defendant to keep the premises in repair is, during the life of W. Pemble, to be considered as entered into by the plaintiff on the behalf and at the request of W. Pemble ; and the plaintiff is plainly therefore entitled to be indemnified out of the assets of W. Pemble for W. Pemble's breach of that covenant. It can make no difference in this principle, that the plaintiff upon the death of W. Pemble became entitled to the beneficial interest in the remainder of the lease.

Demurrer overruled.

† 15 R. R. 225 (1 J. & W. 522).

ATTORNEY-GENERAL *v.* COMBER.†

(2 Sim. & St. 93—95.)

1824.
July 1, 3.

A bequest “to the widows and orphans of the parish of L.” held a good charitable bequest.

LEACH, V.-C.
[93]

JOSEPH COMBER by his will bequeathed as follows :

“Whatsoever there may be from the property now in Chancery belonging to the late Cleophus Comber, my father, now to me, one fourth to my uncle William Kelsey, one fourth to the widows and orphans of the parish of Lindfield, Sussex, the remaining half to my uncle Charles Comber.”

The information in this case prayed that it might be declared that this bequest to the widows and orphans *of the parish of Lindfield, was a valid bequest to a charitable use. It appeared that the amount of the property was likely to be so very small that, if the charitable bequest were held to be good, it could not be enough to form a permanent fund, but must be the subject of immediate distribution.

[*94]

Mr. Hart and *Mr. Cooper*, for the information, cited *Attorney-General v. Peacock*,‡ *Attorney-General v. Clark*,§ *West v. Knight*.||

Mr. Horne, *Mr. Sugden*, and *Mr. Ching*, for the defendant, insisted that it was not a personal gift to the widows and orphans, and that the description of the persons was too general and uncertain.

THE VICE-CHANCELLOR :

A gift to the widows and orphans of the parish of Lindfield, could not in its nature have proceeded from motives of personal bounty to particular individuals; it must have proceeded from general benevolence towards two classes of persons who were suffering under a common circumstance of destitution or privation, and is necessarily to be confined to such of those two

† *Re Wall* (1839) 42 Ch. D. 510.§ *Amb.* 422.‡ *Finch*, 245.

|| 1 Ch. Ca. 134.

ATT.-GEN. classes who are within the scope of general benevolence. I
 v. must act upon this bequest, as if the expression had been to
 COMBER. the *poor* widows and orphans of Lindfield. Declare this to be a
 charitable use.

[It was referred to the Master to appoint trustees of the
 charity fund.]

1824.

July 5.

NOEL v. LORD WALSLINGHAM.

(2 Sim. & St. 99—112; S. C. 3 L. J. Ch. 12.)

LEACH, V.-C.

[99]

A father being tenant for life under his marriage settlement, with power to appoint the shares in which his younger children were to take a sum to be raised for their portions, having exercised the power by his will, afterwards made a provision for one of his daughters, took a release from her of her portion, and by a codicil revoked the appointment in his will, so far as it respected her: Held, that her share did not sink into the freehold, or belong to his residuary legatee, but that the other younger children were entitled to the whole fund.

By the marriage settlement of Paul Cobb Methuen, Esq., the father of the plaintiff Mrs. Noel, dated in April, 1776, certain manors and other hereditaments in the counties of Wilts, Gloucester, and Somerset, were conveyed to the use of Paul Cobb Methuen during his natural life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of certain other trustees, for the term of five hundred years, and, subject thereto, to the use of the first and other sons of the marriage successively in tail male, with divers remainders over. The trusts of the term of five hundred years were, in case there should be two or more children of the marriage other than an eldest or only son, to raise the sum of 15,000*l.* for their portions, in such shares and proportions as Paul Cobb Methuen should, by any writing under his hand and seal, or by his last will and testament, or any codicil thereto, appoint, and, in default of such appointment, to be equally divided amongst them; the shares to become vested at the usual periods, but not to be payable until six months after the decease of Paul Cobb Methuen, and then to be paid with interest from his death after

the rate of four per cent. per annum, and not sooner, unless Paul Cobb Methuen should by writing under his hand direct such portions, or any part thereof, to be raised and paid in his lifetime. Provided that, if Paul Cobb Methuen should in his lifetime give or advance unto or for any child or children of the marriage entitled to portions under the trusts of the term of five hundred years, any sum or sums of money, lands, tenements, goods or chattels for or towards the advancement *and preferment of such child or children respectively in marriage, or otherwise, then such sum and sums of money, and the value of such lands, tenements, goods and chattels, should be, and be deemed, accounted and taken as and for part, if less, and, if as much or more, for the whole of the portions and provisions before provided and appointed to be raised to and for him, her or them respectively, unless Paul Cobb Methuen should by writing under his hand signify and declare the contrary.

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There was issue of the marriage four sons and five daughters ; (that is to say), the defendant Paul Methuen the eldest son, Charles Lucas Methuen, Matilda Lady Walsingham, Catherine Matilda Plumptree, the Rev. Thomas Anthony Methuen, the plaintiff Cecilia Penelope Noel, Gertrude Grace O'Bryen, Ann Christian Methuen [and John Andrew Methuen].

Paul Methuen, the father of Paul Cobb Methuen, by his will dated the 10th of April, 1798, devised certain manors and hereditaments to trustees, upon trust, upon the request of Paul Cobb Methuen, to sell and dispose thereof, and upon the receipt of the purchase money, to pay the sum of 20,000*l.* amongst the younger sons of Paul Cobb Methuen, in case they should attain the age of twenty-one years, in such shares as Paul Cobb Methuen should think fitting ; and he thereby declared that the 20,000*l.*, when so paid to such younger sons, should be accepted by them in full satisfaction of their shares of the sum of 15,000*l.* provided for the portions of the younger children of Paul Cobb Methuen by his marriage settlement, and that the 15,000*l.* should then be left to be shared amongst his remaining younger children.

In 1795 the testator died.

Previous to the marriage of Lord and Lady Walsingham,

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Paul Cobb Methuen, by an indenture dated the 12th of May, 1804, appointed that the sum of 3,000*l.* should be Lady Walsingham's share of the 15,000*l.*

By a deed-poll, dated the 17th of May, 1804, and executed by Lord and Lady Walsingham and Paul Cobb Methuen, in consideration of certain sums of money having been advanced and paid, or secured to be paid, by Paul Cobb Methuen on Lady Walsingham's marriage, to her husband and the trustees of her marriage settlement, the sum of 3,000*l.* so appointed in favour of Lady Walsingham, and all interest she or her husband might claim in respect thereof, was assigned to Paul Cobb Methuen, his executors, administrators and assigns, absolutely.

Ann Christian Methuen died intestate in the lifetime of her father, having previously attained the age of twenty-one years ; and the defendant Paul Methuen, after his father's decease, took out letters of administration to her estate.

Paul Cobb Methuen, by his will dated the 12th of October, 1809, directed the estates and hereditaments out of which the 20,000*l.* was to be raised, to be sold, and the trustees to stand possessed of the purchase money upon trust, as to the sum of 1,000*l.* part thereof, for his second son Thomas Anthony Methuen, his executors, administrators and assigns, to be paid immediately after his decease ; and, as to the sum of 9,000*l.*, in trust for his third son Charles Lucas Methuen ; and, as to the sum of 10,000*l.*, in trust for his youngest son John Andrew Methuen. And he thereby directed, in further pursuance *of the will of Paul Methuen, that the 15,000*l.* by his marriage settlement directed to be raised and paid unto his younger children, should be paid to his daughters only, except Lady Walsingham (and to whom on her marriage he had paid the sum of 7,000*l.* in lieu of any share she might have been entitled to of the sum of 15,000*l.*) in equal shares and proportions, and in such manner as the same was directed to be paid to his younger children by his settlement.

By a deed-poll dated the 15th of June, 1813, Thomas Anthony Methuen, in consideration of a sum of money advanced and secured to him by Paul Cobb Methuen, released unto Paul Cobb Methuen and his heirs all his right, title, and interest in and to

the manors and other hereditaments comprised in the settlement and will of Paul Methuen, and charged with the payment of his portion as one of the younger children of Paul Cobb Methuen.

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By a deed-poll dated the 31st of March, 1815, Gertrude Grace Methuen, afterwards Lady Edward O'Bryen, in consideration of 10,000*l.* secured for her by Paul Cobb Methuen, released to Paul Cobb Methuen and his heirs all her right, title, and interest in or to the manors and hereditaments comprised in the settlement charged with the payment of her portion as one of the younger children of Paul Cobb Methuen; so that neither she, her heirs, executors, administrators or assigns, nor any other person or persons in trust for her or them, or in her or their name or names, or in the name, right or stead of her or any of them, might, by virtue of such indentures, or by any other ways or means whatsoever, thereafter have or demand any right, title, or interest of, in, to *or out of the same manors, messuages, lands or hereditaments in respect of her share or proportion of such sum or sums of money so directed to be raised for such provision as aforesaid, but that she, her heirs, executors, administrators or assigns, and every of them, and all and every person or persons whomsoever claiming by, from, through or under her or them, from all estate, right, title, property, claim or demand, of, in, to or out of the same manors, messuages, lands, hereditaments and premises, or any of them, or any part thereof, should be thereby for ever excluded and debarred.

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Paul Cobb Methuen made a codicil to his will, dated the 1st of April, 1815; and, after reciting his will, and an indenture, whereby, in contemplation of the then intended marriage between his daughter Gertrude Grace with Lord Edward O'Bryen, 10,000*l.* had been paid to her, or for her benefit, as a marriage portion, he, in consideration of such provision so made for his daughter Gertrude Grace, did thereby revoke, annul and make void the direction and appointment so by him before made in and by his will or otherwise, with respect to the sum of 15,000*l.* so far only as respected his daughter Gertrude Grace and her share or proportion of the same respectively, but not further or otherwise with respect to his other daughters, except Lady Walsingham.

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Paul Cobb Methuen died sometime in the year 1816; and, after his decease, administration, with his will and codicil annexed, was granted to the defendant Paul Methuen, his eldest son, and residuary legatee.

Mrs. Noel and Mrs. Plumptree married after their father's death.

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The bill charged that, under the circumstances before stated, the plaintiff, Mrs. Noel, became entitled to share with her sister Mrs. Plumptree, in the whole of the 15,000*l.*, together with interest after the rate of four per cent. per annum from the decease of Paul Cobb Methuen, in equal moieties: and it prayed that the trustees of the term of five hundred years might be directed to raise the 15,000*l.* in pursuance of the trusts of the settlement; and that Mrs. Noel might be decreed to be entitled to a moiety of that sum, with interest after the rate of four per cent. from her father's decease.

The defendant Paul Methuen, by his answer, submitted that Mrs. Noel was not entitled to share with Mrs. Plumptree in the 15,000*l.* in equal moieties, for that Thomas Anthony Methuen not having received an adequate or reasonable share with his other younger brothers out of the 20,000*l.*, nor having made any election to accept that provision in lieu of the provision made for him by the settlement, was entitled to share with his four sisters in the 12,000*l.*, being so much of the 15,000*l.* as remained after the appointment of the 3,000*l.* to Lady Walsingham; and that, being so entitled, Thomas Anthony Methuen, in consideration of a sum of money advanced to him by Paul Cobb Methuen, by the deed-poll of the 15th day of June, 1818, assigned to Paul Cobb Methuen all his right and interest both in the 20,000*l.* and 15,000*l.*, and that thereupon the same fell into and formed part of Paul Cobb Methuen's residuary personal estate, and then belonged to him the defendant Paul Methuen as Paul Cobb Methuen's executor and residuary legatee. And he insisted that, in consequence of the release or assignment made by Lady Edward O'Bryen to Paul Cobb Methuen, and also of the revocation contained in the codicil as to her share, Mrs. Noel and

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Mrs. Plumptree *became entitled to two-thirds only of the 3,000*l.* in equal shares, and that the remaining third, in consequence of the revocation contained in the codicil, fell into the

residue of the testator's personal estate; and that, as to the sum of 12,000*l.*, two-thirds thereof, after deducting 2,400*l.*, the share of Thomas Anthony Methuen, were divisible between Mrs. Noel and Mrs. Plumptree in equal shares; and that, of the remaining 3,200*l.*, 2,400*l.* being the amount of the original share of Lady Edward O'Bryen, by virtue of the release or assignment became the property of the testator, and fell into the residue of his personal estate, to which he the defendant Paul Methuen was entitled as aforesaid; and that 800*l.*, the remainder of the 12,000*l.*, being left altogether unappointed, became divisible between the personal representative of Paul Cobb Methuen, as the assignee of Thomas Anthony Methuen, Mrs. Plumptree, Mrs. Noel, and the personal representative of Ann Christian Methuen, in equal shares.

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The defendants Charles Lucas Methuen and John Andrew Methuen by their answer said that, in consequence of the appointment made to them by Paul Cobb Methuen, of the sums of 9,000*l.* and 10,000*l.* out of the 20,000*l.* bequeathed by the will of Paul Methuen, and which they had agreed to accept in lieu of their share in the provision made for them by the settlement, they claimed no right or interest in or to the 15,000*l.*

The defendant Paul Mildmay Methuen was the eldest son of the defendant Paul Methuen, and as such was entitled to the first estate of inheritance in the premises. He, by his answer, insisted that by virtue of the two deeds-poll or releases made by Thomas Anthony Methuen *and Lady Edward O'Bryen, their shares in the 15,000*l.* were released to Paul Cobb Methuen, as the owner of the freehold of the hereditaments out of which that sum was to be raised; and that therefore those shares became wholly extinguished.

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Mr. Horne and Mr. Inman, for the plaintiffs.

Mr. Sugden and Mr. Spurrier, for the defendant Paul Methuen:

The release taken from Lady Walsingham was, in effect, an assignment, though it certainly does contain words of release.† But it has all the operation of an assignment; and there would

† The deed, as stated in the brief, was an assignment only.

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be no difficulty in this case but for the decision in *Folkes v. Western*.† * * The case of *Pitt v. Jackson*, or *Smith v. Lord Camelford*,‡ is directly contrary to *Folkes v. Western*. Besides, that case differs from this in the following points: there the daughter's share was undefined; here it is defined by the appointment of the 12th of May, 1804: there the father took no assignment of his daughter's portion, so that it remained for the Court to say whether the advancement was or was not a satisfaction of the portion; here the father took an actual assignment of Lady Walsingham's portion, and thereby secured to himself the benefit of it.

In this view of the case there still remained 12,000*l.* of the original fund to be divided amongst the daughters. By his will he disposes of that sum, and of the 3,000*l.* which he had bought of Lady Walsingham.§

In June, 1813, Thomas Anthony Methuen released all his right, title and interest in the hereditaments charged with his portion to Paul Cobb Methuen and his heirs. The word "heirs" is used here incorrectly. For the heirs of this gentleman never could have any claim to this portion. But the son meant by this release *to give effect to the disposition made by his father's will.

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The testator next makes a provision for Lady Edward O'Bryen, and takes a release from her of her portion under the settlement. He then, by his codicil, revokes the appointment made by his will, so far as it respected her. This revocation has the effect, either of giving that lady's share of the 15,000*l.* under the will to her two other sisters, Mrs. Noel and Mrs. Plumtree, or of wholly withdrawing it from the operation of the will. It is impossible to support the former of these propositions; for there are no words of gift in the codicil. The latter of them is therefore to be maintained; and the consequence is that Mr. Paul Methuen is entitled to the 5,000*l.* as undisposed of.

If the will and codicil were to be wholly disregarded Mr. Paul

† 7 R. R. 271 (9 Ves. 456).

‡ 3 R. R. 36 (2 Ves. J. 698).

§ Does it not appear from Paul Cobb Methuen not keeping these sums distinct in his will, but mentioning them as one entire sum of

15,000*l.* by his marriage settlement provided and directed to be raised and paid amongst his younger children, that he did not consider himself as the purchaser of the 3,000*l.*?

Methuen would be entitled to 6,000*l.* of the 15,000*l.*; for he would be entitled to one sum of 3,000*l.* as the purchaser of Lady Walsingham's share, and to another sum of the same amount, as the purchaser of Lady Edward O'Bryen's share. So that the least that he can be entitled to, in any view of the case, is 5,000*l.*

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At all events, if these instruments are considered to operate as releases only of these portions, Mr. Paul Methuen is entitled to the benefit of them as tenant for life of the estates on which the portions were charged.

Sir Giffin Wilson and Mr. Knight, for Paul Mildmay Methuen :

It is provided by the settlement that if the father should, in his lifetime, advance any of the children entitled *to portions under it, such advancement should be considered as a satisfaction of that child's portion, unless the father should declare the contrary in writing. Under that proviso, an advancement at once extinguishes the share of the advanced child, unless a declaration is made to the contrary.

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If, therefore, Paul Cobb Methuen did not mean Lady Walsingham's share to sink into the freehold, he ought to have declared so, and not to have taken an assignment of it from her.

Supposing, however, that the assignment is considered as tantamount to such a declaration, then the question is whether Lady Edward O'Bryen's 5,000*l.* or any part of it, is to be raised. There is a marked distinction between the conduct of the father on Lady Walsingham's marriage and on Lady Edward O'Bryen's. On the former he makes an appointment of a share and takes an assignment of that share. On the latter he neither makes an appointment nor an assignment, but simply takes a release, as having an interest in the estate as tenant for life. If he intended to give, by the codicil, Lady Edward O'Bryen's share to his two other daughters, he could not do so, because it had been extinguished by the release. But he had no such intention. For if he had so intended he knew how to declare so, and would have done it, and not have simply revoked the appointment in her favour. We, therefore, contend that 5,000*l.* of the 15,000*l.* was extinguished.

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Mr. Roupell, Mr. Miller, Mr. Christie and Mr. Blunt,
appeared for the other defendants.

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THE VICE-CHANCELLOR :

Mr. Paul Cobb Methuen became the purchaser of the 3,000*l.* which he had appointed to Lady Walsingham ; and that sum, not being more than her equal aliquot share of the 15,000*l.*, it might be difficult to question the validity of that appointment or purchase, if the interest of any party required it ; which does not happen to be the case. By the death of the daughter Ann Christian, intestate, after she had attained twenty-one, Mr. Paul Cobb Methuen being entitled to administer to her, his executor could now have claimed her share in any part of the 15,000*l.* which, if unappointed, would have devolved upon her representative. Mr. Paul Cobb Methuen could not have appointed any share after her death to her representative, if he had not been entitled to fill that character himself. When Mr. Paul Cobb Methuen made his will in October, 1809, he had full power to give the 15,000*l.* to his other daughters in exclusion of Lady Walsingham.

The only questions in the cause appear to me to arise upon the subsequent transactions with respect to Lady Edward O'Bryen's portion.

By the terms of the settlement any advance made by the father in his lifetime was to be taken in or towards satisfaction of the portion provided by the settlement for a younger child, unless the father should declare the contrary. I apprehend the true construction of this provision is that, if the father make an advance to an object of the settlement, without any declaration of intention in respect to it, the advance operates to the exoneration of the estate charged with the portion : but that the father is at liberty to declare that the child advanced shall notwithstanding, receive its full portion ; or is at liberty to *consider himself, *pro tanto*, the purchaser of the portion, and to declare, in effect, that it shall remain a charge upon the estate for his benefit. The question, then, with the settled estate is, whether Mr. Paul Cobb Methuen has declared any intention that, notwithstanding the advance made to Lady Edward O'Bryen, her share of the 15,000*l.* should continue a charge upon the settled estate, in

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order to remain at his disposition? I concur with the argument for the personal representative of Mr. Paul Cobb Methuen, that the deed-poll of Lord and Lady Edward O'Bryen of the 31st March, 1815, may, under the circumstances, be treated as an assignment of her interest in the 15,000*l.* to her father; and I take the true intent and effect of his codicil to be, not to leave one-third of the 15,000*l.* unappointed; but, as his will had given the 15,000*l.* equally between his daughters except Lady Walsingham, that the intention of the codicil was further to except Lady Edward O'Bryen, and to give the 15,000*l.* equally between the two other daughters, and the declaration of my decree will be accordingly.

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I may add that, having carefully considered the case of *Folkes and Western*, I do not concur in the observation made at the Bar, that there is error in that decree; inasmuch as it was not declared that the father was a purchaser of Mrs. Lloyd's share. There was, in that case, no expressed intention on the part of the father to that effect. I have more difficulty as to that part of the decree which declares that Mrs. Western, the mother, had lost her power of appointment. The settlement gave her, in the event which happened of her surviving her husband, a power to appoint the whole fund to any one child; and the act of the husband in providing a satisfaction for one child could not, I think, deprive the widow of her *power to appoint the whole fund to the only other child. And such appointment appears to me to have been necessary in order to enable the only other child to take the whole fund; for, there being in fact no appointment either by husband or wife in favour of any child, the consequence should seem to be, under the settlement, that Mrs. Strickland, the unprovided child, could take only a moiety of the unprovided fund, and that the other moiety, which by the terms of the settlement would vest in Mrs. Lloyd, the provided child, would sink for the benefit of the estate charged, if, as I think, the father could not be considered as a purchaser, but would otherwise be a part of the personal estate of the father. The case of *Boyle v. The Bishop of Peterborough*† bears strongly upon this view of the case.

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† 2 R. R. 108 (1 Ves. J. 299).

1824.
Nov. 24.

CAWTHORN v. CHALIÉ.

(2 Sim. & St. 127—129; S. C. 3 L. J. Ch. 125.)

LEACH, V.-C.

[127]

Where a partner dies intestate leaving the partnership accounts unsettled, the Court will grant administration of his effects to the surviving partners, or any persons claiming under them, if his next-of-kin decline it.

MATTHEW CHALIÉ, Edward Green, and John Chalié, deceased, had been in partnership as wine merchants; and, after John Chalié's death, the business was continued by the survivors. In November, 1813, they dissolved partnership. The accounts of either of the partnerships had never been finally settled. In August, 1821, Green assigned to the plaintiff his share of the profits of both the partnerships, as an indemnity for having joined as a surety for him in a bond. The bill prayed to have the accounts taken, and the affairs of the partnerships wound up. It alleged that there was not then any personal representative of John Chalié, but that the defendant, Matthew Chalié, was his only surviving next-of-kin, and was then entitled to take out administration to his estate, but that he refused so to do, or to permit the plaintiff to obtain the same; and that the plaintiff, by reason of such refusal, was unable to obtain letters of administration to John Chalié, or to make his personal representative a party to the suit.

The defendant, Matthew Chalié, demurred to the bill.

* * *

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Mr. Horne and *Mr. Tinney*, in support of the demurrer, insisted that the allegations of the bill did not form a sufficient reason for proceeding in the cause without a representative of John Chalié. * * *

Mr. Agar and *Mr. Ching* appeared in support of the bill.

* * *

The VICE-CHANCELLOR ordered the case to stand over, in order that the opinion of a civilian might be obtained whether the plaintiff, under the circumstances stated in the bill, was or was

not entitled to procure *an administration to the estate of John Cawthorn
Chalié. * * *

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A case having accordingly been laid before Dr. Jenner, he gave his opinion thereon in the following words :

"I am of opinion that William Cawthorn has not such an interest in the effects of John Chalié as will entitle him to be considered as a creditor, and, in that character, to cite the next-of-kin to accept or refuse administration of his effects. But I am of opinion that the Ecclesiastical Court will grant a limited administration to a person nominated by him for the purpose of substantiating proceedings in Chancery, on the refusal of the next-of-kin after citation, and upon shewing the necessity for such a representation."

When this case was again mentioned, upon the production of Dr. Jenner's opinion, the VICE-CHANCELLOR allowed the demurrer, stating that the plaintiff must procure a limited administration to be granted to John Chalié's estate according to that opinion.

* * *

TYSON v. FAIRCLOUGH.†

(2 Sim. & St. 142—145.)

1824.
Nov. 29.

Motion for a receiver by one tenant in common against his co-tenant, on the ground that the latter had given notice to the tenants to pay their rents to him only, and had advertised the estate for sale, refused, because the conduct complained of did not amount to an exclusion.

LEACH, V.-C.
[142]

THE plaintiffs and the defendant were tenants in common of some freehold and leasehold houses under a will of which the defendant was executor.

In 1814 the defendant had entered into a written agreement with the plaintiffs to permit the latter to receive the whole of the rents, until they had repaid themselves two sums due to them from the defendant. The plaintiffs had been in receipt of the rents ever since the agreement was made; but, in May last, the defendant gave notice to the tenants to pay the rents to him and not to the plaintiffs, and that he would enforce such payment by distress if necessary.

† *Searle v. Smales* (1855) 3 W. R. 437.

TYSON
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FAIRCLOUGH. In July the defendant advertised the houses for sale ; upon which the bill was filed for a receiver and an injunction to restrain the sale : but, before the injunction was served, the defendant had actually sold all the houses but one. The bill insisted that a balance of 51*l.* was still due to the plaintiffs. The answer stated that, by the accounts rendered, such a balance appeared to be due, but that, upon investigation of the accounts, it was found that 25*l.* only was due, allowing the accounts to be just, which the defendant did not admit ; and that *the defendant had tendered the 25*l.* to the plaintiffs, but they refused to accept it : that the plaintiffs had been repaid all that was due to them, or that they might have been repaid it if they had thought proper.

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Mr. Agar and *Mr. Koe*, for the plaintiffs, now moved for a receiver, and founded their application, 1st, upon the agreement ; 2nd, upon the notice given by the defendant to the tenants.

* * *

[The cases cited are referred to in the judgment.]

THE VICE-CHANCELLOR :

If the defendant were now availing himself of his legal title to receive rents and profits which, under the agreement, were, in effect, assigned to the plaintiffs, there would be ground for the appointment of a receiver ; but according to the answer he has fully paid the sum mentioned in the agreement, except a small balance, which has been tendered to the plaintiffs and refused. It is said, however, that the notice given by the defendant to the tenants no longer to pay the rents to the plaintiffs but to him, the defendant, amounts to an exclusion of the plaintiffs from their own share of the profits of the undivided estate, and that where there is such exclusion a court of equity will, according to the cases cited, appoint a receiver. Exclusion is where one tenant in common receives the whole rent, and excludes his companion from the share due to him. The notice of the defendant is not exclusion : notwithstanding this notice, the tenants may pay *the whole of the rents to the plaintiffs, and certainly may safely pay to the plaintiffs their due share of the rents. I do not even consider, upon the circumstances of this

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case and the answer of the defendant, that this notice is evidence of an intention on the part of the defendant to withhold from the plaintiffs the share of the rents which belongs to them. The defendant does not dispute the title of the plaintiffs; the agreement is founded on the admitted title of the plaintiffs; and the plain purpose of the notice is to prevent the plaintiffs from receiving the rents, because they insist upon retaining the defendant's share in satisfaction of a balance which, according to the answer of the defendant, is not due from him. I may observe that, even in the case of any actual exclusion of one tenant in common by another, I doubt whether this Court would appoint a receiver. If it were an exclusion which amounted to an ouster at law the party complaining must assert at law his legal title. If it were not such an exclusion, this Court would compel the tenant in common in receipt of the rents to account to his companion; but would not, I think, act against his legal title to possession; and the reason is, because the party complaining may at law relieve himself by the writ of partition. It is upon this ground that this Court has constantly refused to restrain a tenant in common from cutting timber, or doing any other act not amounting to destruction. Where the estate in common is equitable, the Court does interfere; because it acts against the legal estate of the trustee only, who is guilty of a breach of trust if he permits one equitable tenant in common in any manner to prejudice the interest of the other. Of the cases cited, *Street v. Anderton* † was an equitable estate; *Evelyn v. Evelyn* ‡ is but a word, and does not explain the nature of the estate; and **Milbank v. Revett* (2 Mer. 405), which was very shortly and very loosely argued, considers that the principles which are applied to partners are applicable also to tenants in common, which probably would not have been the opinion if the case had been more fully argued.

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† 1 Dick. 800.

‡ 4 Br. C. C. 414.

1824.

Nov. 4.

LEACH, V.-C.

[165]

FOLJAMBE v. WILLOUGHBY.

(2 Sim. & St. 165—169.)

Where there are several funds provided by different persons for the maintenance of infants, the interest of the infants must alone determine which of the funds is first applicable.

THE plaintiffs were infants, and this suit was instituted for the purpose of having it determined out of which of several funds provided for the purpose, they were to be maintained and educated.

By a settlement, dated the 17th of October, 1798, made upon the marriage of John Savile Foljambe, certain real estates were limited to the use of him for life, with remainder to the use of trustees for five hundred years, with remainder to the first and other sons of the marriage in tail, with the ultimate remainder to the use of John Savile Foljambe in fee. The trusts of the term of five hundred years were declared to be that, in case there should be an eldest son of the marriage and three or more younger children, the trustees should, by sale or mortgage, raise the sum of 5,000*l.* to be divided among the younger children, in such shares as *the father should appoint; and, in default of appointment, equally; the portions of sons to be payable at twenty-one, or sooner, if the trustees, after the death of the father, should think proper, for their advancement; and the portions of daughters, at twenty-one or marriage, with benefit of survivorship in case any of the children died before their shares became payable; and, after the death of John Savile Foljambe, to raise, for the maintenance of the younger children, till their portions should become payable, such sums of money as the trustees should think necessary, not exceeding the interest of their portions at the rate of four per cent. per annum.

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John Savile Foljambe, by his will, after ratifying the settlement and giving divers pecuniary and specific legacies, bequeathed all the residue of his personal estate to trustees, upon trust to pay, assign and transfer it unto and equally amongst all his younger children who should be living at the time of his decease, or be born in due time afterwards, share and share

alike, the shares of sons to be paid at twenty-one, and of daughters, at twenty-one or marriage; and, in the meantime, the dividends and interest to be applied by the trustees, at their discretion, towards their maintenance and education. FOLJAMBE
v.
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John Savile Foljambe died in 1805, soon after the date of his will, leaving issue of the marriage four children, of whom the three youngest were infants, and were the plaintiffs in this suit.

After his death, his father, Francis Ferrand Foljambe, who was also a party to the settlement, made his will, dated in 1813, and by it devised certain real estates to *trustees for a term of two hundred years, upon trust to apply a sufficient part of the rents and profits, at their discretion, for and towards the maintenance and education of his four grandchildren, the children of his late son John Savile Foljambe, during their minorities, in such proportions and manner as the trustees should, in their discretion, think most advisable; and also upon trust, subject to the payment of certain debts and legacies to the plaintiffs and other persons, and also to the maintenance of the infants, to permit the person entitled for the time being to the estate in remainder immediately expectant on the term, to receive the rents and profits. [*167]

Francis Ferrand Foljambe died soon after the date of his will.

After the death of John Savile Foljambe, and until the death of Francis Ferrand Foljambe, the trustees and testamentary guardians of the plaintiffs received the interest of their portions under the settlement, and applied it, together with the interest of the residuary personal estate of John Savile Foljambe, in the maintenance and education of the plaintiffs.

The only fortunes to which the plaintiffs were entitled were the legacies of 5,000*l.* each under the will of their grandfather, and the provision made for them by the settlement and will of their father. George Savile Foljambe, the eldest son, was entitled to very large estates, which yielded him a yearly income of above 14,000*l.*

The bill, after stating these circumstances, * * prayed that the rights and interests of the plaintiffs, and of George [163]

FOLJAMBE Savile Foljambe, their eldest brother, might be ascertained and
v. declared, and proper accounts be taken for that purpose.
WILLOUGHBY

The eldest son, by his answer, insisted that the income of the residuary personal estate of John Savile Foljambe, his father, was first applicable for the maintenance of the plaintiffs.

The cause now came on to be heard.

Mr. Heald and *Mr. Teed*, for the plaintiffs, contended that, according to the general principle on which the Court acts towards infants, the funds must be applicable in the manner most beneficial to them ; and, therefore, that the provision made for the maintenance of the plaintiffs by their grandfather, must be first applied. * * *

[169] *Mr. Bell*, for George Savile Foljambe, the eldest son, argued that the fund provided by the will of the father must be first applied ; and that the provision made by the grandfather's will, was only in aid of that fund.

THE VICE-CHANCELLOR :

The will of Francis Ferrand Foljambe has no manner of reference either to the settlement or will of John Savile Foljambe. It gives to the children of John Savile Foljambe an absolute independent right to call for maintenance from his estate.

Where there are two funds absolutely given by different persons for the maintenance of an infant, the interest of the infant must determine which of the two funds is to be applied.

Declare that the trustees of the term of two hundred years created by the will of Francis Ferrand Foljambe, are bound to supply a sufficient part of the rents and profits of the trust estate for the maintenance and education of the children of John Savile Foljambe ; and, if the parties require it, refer it to the Master to inquire what would be proper to be allowed in that respect.

WATKINS *v.* CHEEK.†

(2 Sim. & St. 199—206.)

1825.

Jan. 25.

Feb. 2.

LEACH, V.-C.

[199]

A legacy was charged upon real estate, to vest immediately on the testator's death, but to be paid to the legatee on attaining twenty-one, and the interest to be applied in the meantime for maintenance, the legatee having died before attaining twenty-one: Held, that the express direction that the legacy should vest on the death of the testator, prevents its sinking for the benefit of the estate, and that the personal representative of the legatee was entitled to the legacy.

Where real estate is devised subject to debts and legacies, and the devisee is also executor, a purchaser or mortgagee from him of the real estate is liable to the charge, if the circumstances of the transaction afford intrinsic evidence that the mortgage or purchase money was not to be applied for the debts or legacies.

RICHARD WALKER, by his will, bequeathed to his two daughters, Jane and Sophia Walker, 1,000*l.* apiece, the same to vest in them immediately upon his death, but to be paid on their attaining their ages of twenty-one years, and the interest thereof, in the meantime, to be applied by his executrix in their maintenance and education; and he charged his real estate with the payment of those legacies: and, subject to the payment of his debts and funeral and testamentary expenses, which he desired might be paid by his executrix immediately after his decease, he gave all his real and personal estate to his wife for ever, and appointed her sole executrix of his will.

The testator died, leaving his wife and the two daughters named in his will, who were infants of tender age, him surviving.

The widow proved the will; and the personal estate being insufficient for the payment of the testator's debts, she supplied the deficiency out of the rents and profits of the real estate. The widow afterwards married J. Watkins; and, by a settlement made previous to their marriage, the real estate of her first husband was conveyed to such uses as the widow should appoint by deed or will; and, for want of such appointment, to *the separate use of the widow for her life, with remainder to her two daughters, Jane and Sophia Walker, in fee.

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There were issue of this marriage two daughters, Margaret

† *Corser v. Cartwright* (1875) L. R. 7 H. L. 731.

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Watkins, who was born on the 19th of June, 1802, and Jane Watkins, who was born on the 27th of July, 1804.

The daughters of the first marriage both died infants, intestate and unmarried; the elder having died on the 23rd of October, 1803, and the younger on the 21st of January, 1819.

J. Watkins, the second husband, died in the year 1810. In June, 1814, the widow intermarried with Solomon Cheek; and, by a settlement made previous to that marriage, the real estate of the testator, Richard Walker, was again settled to such uses as the widow should appoint by deed or will, and, for want of such appointment, to the separate use of the widow for life, with divers remainders over.

In October, 1816, Solomon Cheek and his wife mortgaged this estate to Henry Burgess for 4,000*l.* The mortgage deed recited that Solomon Cheek, having occasion for the loan of 4,000*l.* he and his wife had requested Burgess to advance the same to him, upon the security of the estate; and the 4,000*l.* was in the deed stated to have been advanced to him, at the request of his wife; and he alone signed the receipt for the 4,000*l.* indorsed on the deed. The right of redemption was reserved to Mr. and Mrs. Cheek and the heirs, executors and administrators of the latter.

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By indenture, bearing date on the 29th of September, 1818, Mrs. Cheek appointed the estate, subject to the mortgage, to such uses as her husband should, by deed, appoint, with divers remainders over in default of appointment, with the ultimate remainder to her husband in fee. He afterwards borrowed from Burgess a further sum of 2,000*l.*; and, by an indenture bearing date the 23rd of March, 1819, directed and appointed the estate, by virtue of the deed of the 29th of September, 1818, to be a security, not only for the 4,000*l.* before advanced, but also for the 2,000*l.* then advanced to him.

By an indenture, bearing date the 2nd of June, 1820, Cheek directed and appointed that the estate should remain and be upon trust for such persons, and for such estates and purposes, as his wife should, by deed, appoint, with divers remainders over in default of her appointment.

By other indentures, bearing date the 26th and 27th of September, 1820, Mr. and Mrs. Cheek joined in conveying the

estate to trustees, upon trust to sell, and to invest the produce of the sale upon real or Government security, and to apply the same as Mrs. Cheek should appoint; with divers limitations over in default of appointment.

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CHEEK.

On the 27th of July, 1821, the trustees for sale entered into an agreement with Burgess to sell the estate to him for 7,350*l.* deducting thereout the principal and interest due to him in respect of his two mortgages for 4,000*l.* and 2,000*l.*

In order to complete this purchase, one Bousfield, at *the request of Burgess, obtained letters of administration to Jane and Sophia Walker. But notice was given to Bousfield, on the part of Margaret and Jane Watkins, the two daughters of Mrs. Cheek by her second husband, that they claimed, as next-of-kin of Jane and Sophia Walker, an interest in the two sums of 1,000*l.* given to them by the will of their father, as charges upon the estate. Bousfield therefore declined to join in the conveyance to Burgess; and his purchase was not completed.

[*202]

Mrs. Cheek had no child by her third husband.

The present bill was filed by Margaret and Jane Watkins, claiming to be entitled, with their mother, to the two sums of 1,000*l.* given to Jane and Sophia Walker; and praying that their shares of these two sums might be raised, with interest, by sale or mortgage of a sufficient part of the estate, and be laid out or invested for their benefit. The defendants were Burgess, Mr. and Mrs. Cheek, the trustees for sale under the indentures of the 26th and 27th of September, 1820, and Bousfield, as the administrator of Jane and Sophia Walker.

It was admitted that, after satisfying the principal and interest due on the two mortgages for 4,000*l.* and 2,000*l.* the estate would not be sufficient to pay the shares of the two sums of 1,000*l.* which were claimed by the two plaintiffs.

Cheek and his wife did not resist the claim of the plaintiffs.

Mr. Sugden and *Mr. Treslove*, for the defendant Burgess :

I. The legacies to Jane and Sophia Walker are made *payable at twenty-one; and, as they died before attaining that age, their legacies sink for the benefit of the land. The general rule as to legacies charged upon land is, that the time of vesting is

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the time of payment, and that, if the legatee dies before the time of payment, his personal representatives are not entitled. The mere circumstance of directing maintenance does not vest a legacy. * * *Poulet v. Poulet*.† * * *Earl of Rivers v. Earl of Derby*; † *Wilson v. Spencer*; § *Hodgson v. Rawson*; || *Lowther v. Condon*; ¶ *Manning v. Herbert*.††

II. The real estate, being charged with the debts of the testator Richard Walker, Burgess, as mortgagee or purchaser, is not bound to take notice of the legacies.

[204]

Mr. Agar and Mr. Duckworth, for the plaintiffs :

There are here express words that the legacies should vest on the testator's death. The Court is bound by those expressions. The cases cited have no application ; as they are cases where the payment was postponed on account of the situation of the fund : *Duke of Chandos v. Talbot* ; †† *Jennings v. Looks*.§§

Mr. Sugden, in reply :

Here there is a direction that the legacy shall be vested at one time, and paid at another. The time of payment is what the Court must look to, when the question is whether the legacy is to be raised or not : *Cowper v. Scot*.|||

THE VICE-CHANCELLOR :

The first point made is, that the two legatees, Jane and Sophia Walker, having died before their ages of twenty-one, when the legacies are made payable, the legacies, as against the real estate, must sink for the benefit of the devisee. And this would certainly be the case, unless the testator, by his direction that the legacies shall vest in his daughters immediately upon his death, be considered to have expressed a different intention.

I have doubted much upon this question ; but, upon the whole, I believe the safest construction is, that the testator did, by the direction in question, mean to express that the legacies should

† 1 Vern. 204, 321.

‡ 2 Vern. 72.

§ 3 P. Wms. 172.

|| 1 Ves. Sen. 44.

¶ 2 Atk. 127.

†† Amb. 575.

‡‡ 2 P. Wms. 612.

§§ 2 P. Wms. 276.

||| 3 P. Wms. 119.

not sink for the benefit of the devisee of the land if the daughters should die under twenty-one. As applied to the personal estate, this direction is wholly inoperative. Without this direction, the legacies, from the form of the gift, *would have been payable out of the personal estate if the legatees had died under twenty-one. And, as applied to the real estate, the direction does not seem capable of any other meaning than that the legacies shall not fail by the death of the legatees before the time of payment.

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[*205]

The next point made is, that this real estate, being primarily charged with the debts of the testator, the mortgagee was not bound to look to the satisfaction of the legacies. As a general principle, this proposition cannot be questioned. So a mortgagee or purchaser, from the executor, of a part of the personal property of the testator, has a right to infer that the executor is, in the mortgage or sale, acting fairly in the execution of his duty, and is not bound to inquire as to the debts or legacies. But if the nature of the transaction affords intrinsic evidence that the executor, in the mortgage or sale, is not acting in the execution of his duty, but is committing a breach of trust, as where the consideration of the mortgage or sale is a personal debt due from the executor to the mortgagee or purchaser, there such mortgagee or purchaser, being a party to the breach of trust, does not hold the property discharged from the trusts, but equally subject to the payment of debts and legacies as it would have been in the hands of the executor.

The same principle is applicable to real estate; and the question is, whether the transactions in question did not afford intrinsic evidence that the mortgages to the defendant were not made by Cheek and wife, in order to pay the charges created on the estate by the will of the testator Walker, but for other purposes which amounted to a breach of trust. In the mortgage *deed for 4,000*l.* it is expressly stated that the money is raised because Solomon Cheek, the husband, had occasion for it; and he alone signs the receipt for the consideration. The mortgagee had therefore notice, from the intrinsic evidence of the transaction, that this sum was not to be applied in satisfaction of the charges under the testator's will.

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Before the lending of the second sum of 2,000*l.* Solomon Cheek had, by the appointment of his wife, acquired the legal fee of the estate, subject to the first mortgage; and the second sum of 2,000*l.* is a mere personal loan to him, having no colour of connection with the charges on the testator's estate. I am of opinion, therefore, that the defendant, the mortgagee, was a party to the breach of trust committed by these mortgages, and that the plaintiffs are entitled to a decree according to the prayer of the bill.

1825.
Fid. 8, 10, 22.

LEACH, V.-C.
[214]

THACKERAY v. HAMPSON.

(2 Sim. & St. 214—217; S. C. 3 L. J. Ch. 89.)

A gift of residue to two persons equally, to be held in trust until they come of age or marry, and if either dies unmarried or under age, to the survivor; but if both die leaving no issue, then as therein mentioned: Held, that the gift vested indefeasibly at twenty-one or marriage.

ELIZABETH TATTERSALL made a will and two codicils: the second codicil was in her own handwriting, and contained the following bequest:

"I leave the residue and whatever else I may hereafter be entitled to, whatsoever and wheresoever, to my two dearest grand-daughters, Mary Ann Cottin and Elizabeth Margarett Cottin, equally divided, including what I have already left them in my will and other codicil, in trust till they come of age or marry, which shall first happen, the interest to be received in the meantime and paid them; but if one of them die before marriage or of age, then to go to the survivor, or her child or children; but should they both die leaving no issue, I then give them the power to leave it, by will, as they shall think proper, being well assured they will do what is right."

Mary Ann Cottin married the plaintiff, Dr. Thackeray, and afterwards died, leaving an infant child, who was one of the defendants. Elizabeth Margarett Cottin, the other plaintiff, long since attained the age of twenty-one.

The question was, what interest the grand-daughters had in the residue.

Mr. Heald and Mr. Lynch, for the plaintiffs :

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v.
HAMPSON.
[*215]

The grand-daughters take absolute interests, liable *to be divested in case of their dying under twenty-one or before marriage. Both of them having lived till one of them was married and the other attained twenty-one, their interest became absolute and indefeasible. * * In the passage, “but if one of them die before marriage or of age,” the word *or* must be read *and* ; because, if taken in the disjunctive and one of the grandchildren died under twenty-one leaving issue, the issue could not take: *Eastman v. Baker*.† * * The words, “should they both die leaving no issue,” must be confined to their dying under twenty-one without issue: [*Right v. Day*,‡ *Doo v. Brabant*.§]

[216]

Mr. Thomson for the infant defendant Thackeray. * * *

Mr. Turner and Mr. Bassett for the other defendants, who were trustees.

THE VICE-CHANCELLOR :

It is impossible to reconcile the different expressions in this codicil, if they are to be literally understood. The testatrix first gives to the grand-daughters an absolute interest on their attaining twenty-one or marrying sooner ; and, if either die before twenty-one and unmarried, then her plain intention is, that her *share shall go to the other grand-daughter, if she be living ; or, if she be dead, to any child or children she may have left.

Feb. 22.

[*217]

It is not safe to defeat this plain expressed intention of the testatrix by a subsequent ambiguous passage. Both grand-daughters having lived either to marry or to attain twenty-one, both took absolute vested interests : and the testatrix must be intended, by the expression, “should they both die leaving no issue,” to have meant a dying without issue before the shares became absolutely vested.

† 9 R. R. 728 (1 Taunt. 174, 182). § 2 R. R. 503 (4 T. R. 706).

‡ 14 R. R. 294 (16 East, 67).

HODGSON *v.* DEAN.

(2 Sim. & St. 221—225 ; 3 L. J. Ch. 95.)

1825.

Feb. 21.*March* 7.

LEACH, V.-C.

[221]

On Appeal.

July 26.Lord
ELDON, L.C.

[*222]

Where it appears that an incumbrancer on an estate in Yorkshire searched the register from a certain date only, it will not be presumed that he had notice of any of the contents prior to that date.

NATHANIEL HODGSON, by his marriage settlement, dated in August, 1755, conveyed an estate in the North Riding of Yorkshire, to the use of himself for life; with remainder to his intended wife for life; with *remainder to the first and other sons of the marriage in tail male; with divers remainders over. At the date of the settlement the legal estate in fee was outstanding in a mortgagee [under a mortgage made in 1728]; but in 1759 Nathaniel Hodgson took a re-conveyance from the mortgagee to himself in fee. In 1794 Nathaniel Hodgson died, leaving Nathaniel Bryan Hodgson his eldest son, who, upon the death of his father, entered upon the estate, as tenant in tail under the settlement. In November, 1815, Nathaniel Bryan Hodgson, representing himself to be seised in fee of the estate, mortgaged it to the defendant Dean for a term of one thousand years; and, in the abstract of title delivered to the defendant upon that occasion, he suppressed his father's settlement, but stated the mortgage in 1728, the re-conveyance to his father after the settlement, and represented himself as taking by descent from his father. The first mortgage was not registered, because the Register Act for the North Riding of Yorkshire was not passed till after it was executed; but the settlement and the defendant's mortgage deed were duly registered. On the treaty for the mortgage, the defendant's solicitor wrote to the Deputy Registrar of the Riding, requesting that he would search the register as to the estate in question up to the year 1794, when Nathaniel Hodgson died; and was informed, in answer, that the search had been made up to the year 1794, but that nothing had been found relating to the estate, except a deed executed by Nathaniel Bryan Hodgson in 1801, which had no bearing upon the present question.

Upon the death of Nathaniel Bryan Hodgson, without having suffered a recovery of the estate, the present plaintiff, his eldest

son, entered upon it as issue in *tail ; and the defendant having brought an ejectment to recover possession under his mortgage deed, the present bill was filed to restrain that action, on the ground that the defendant had notice of the settlement, in consequence of the search made in the register. The defendant, in his answer, insisted upon his title as mortgagee of the legal estate without notice of the settlement ; and stated that he did not know nor could set forth whether any such settlement was made by Nathaniel Hodgson, nor whether the plaintiff was or not entitled to any estate under that settlement. The injunction having been obtained, a motion was made to dissolve it. The plaintiff, preparatory to showing cause against that motion, filed an affidavit to prove the execution of the settlement, and that no act had been done to bar the estate tail created by it ; but he omitted to prove the marriage of his father and mother.

HODGSON
v.
DEAN.
[*223]

Mr. Hart, and *Mr. Barber*, on showing cause against dissolving the information, said that where the answer of the defendant did not admit the plaintiff's right, it was necessary that the plaintiff should support it by affidavit, and that he had attempted to do so here, but had failed.

The VICE-CHANCELLOR said that, where an instrument was neither admitted nor denied in the answer, it was necessary for the plaintiff to prove the existence of it by affidavit ; but that he thought the rule and practice were otherwise as to the personal title of the plaintiff ; and that he supposed that the reason for the distinction was, that the plaintiff being, from the nature of the proceedings, necessarily in the actual possession *of the land in question, either by himself or his tenant, such possession was considered as sufficient evidence of his alleged title for the purpose of the injunction where, though not admitted, it was not denied by the answer ; and he stated that, where the answer denied the title of the plaintiff, there no affidavit could be filed by the plaintiff in opposition to the answer, and he referred to the case of *Norway v. Rowe*.†

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† 12 B. R. 157 (19 Ves. 144).

HODGSON
v.
DEAN.

But he added that this point was not material ; because, if the affidavit filed by the plaintiff had, as the defendant's counsel alleged, omitted to state the fact of the marriage of the plaintiff's father and mother, he would permit the plaintiff to cure the omission by a further affidavit.

Mr. Hart and *Mr. Barber* then contended that, although it was not necessary for the defendant to search the register when he took the mortgage, yet, having actually caused a search to be made, he must be considered as having constructive notice of all the contents of the register, and consequently of the settlement in 1755, which was duly registered ; and they referred to Lord REDESDALE's opinion in *Bushell v. Bushell*.†

Mr. Sugden and *Mr. Rose* appeared for the defendant.

THE VICE-CHANCELLOR :

[*225] The defendant, not being bound to search the register, cannot be affected by constructive notice of the registered settlement. It must be established against him, that he had actual notice of that settlement. It *is plain, in this case, that he had not actual notice, since the search made on his part did not reach higher than 1794, and the settlement was made in 1755.

Where a search is generally admitted or proved, there it may be a proper rule of evidence or presumption that the party searching was acquainted with all the contents of the register ; but the particular facts in this case exclude that presumption.

(3 L. J. Ch. 99.)

July 26.

[The LORD CHANCELLOR affirmed this decision on appeal, and was clearly of opinion that notice of the contents of the registry during a particular period was not to operate as notice of entries contained in it relative to an anterior period.]

† 9 R. R. at p. 23 (1 Sch. & Lef. 103).

MALTBY v. RUSSELL†

(2 Sim. & St. 227—228 ; S. C. 3 L. J. Ch. 85.)

1825.
 March 9, 21.
 LEACH, V.-C.
 [227]

An executor or administrator may, after a suit is instituted against him for an account, pay any simple contract or specialty creditor, and will be allowed such payment in passing his accounts.

THIS was a creditor's suit. The decree directed the Master to take the usual accounts.

The personal representatives had, subsequently to the filing of the bill, paid several of the testator's debts, one of which was due to a firm in which one of them was a partner. The Master having refused to allow them the sums they had paid in discharge of those debts, they took exceptions to his report.

These exceptions now came on to be argued.

Mr. Sugden, Mr. Simpkinson, and Mr. Girdlestone, jun. in support of the exceptions [cited *Lord Orford v. Darston*,† *Perry v. Phelps*,§ and other cases].

Mr. Rose and Mr. Pemberton, for the devisees of the real estate.

Mr. Horne and Mr. Lovatt, for the plaintiffs [cited *Bright v. Woodward*,|| and *Dee*¶].

THE VICE-CHANCELLOR on the argument expressed a strong opinion in favour of the Master's report, and doubted the correctness of Colles's report of the case of *Lord Orford v. Darston*.†† His Honour, however, took time to consider of the case, and afterwards delivered judgment to the following effect. [228]

THE VICE-CHANCELLOR :

That an executor should be permitted, after a bill filed for the administration of the assets here, to prefer one creditor to

† *European Assurance Society v. Radcliffe* (1878) 7 Ch. D. 733.

‡ Colles, P. C. 229.

§ 7 R. B. 331 (10 Ves. 34).

|| 1 Vern. 369.

¶ 2 Ch. Ca. 200.

†† See the note at the end of this report.

MALTBY
v.
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another, breaks in upon the ruling principle that equality is equity. Even at law, an executor cannot, after an action brought, prefer one creditor to another, unless judgment is first obtained against him; which is founded upon the principle of greater legal diligence. He is indeed permitted to confess such judgment (which breaks in upon the principle of greater legal diligence), because it is said that he is not bound to charge his testator's estate with costs by defending the action where he knows the debt to be due.

I find, however, that the case of *Darston v. Lord Orford*, in the House of Lords, is correctly reported; and in *Waring v. Danvers*,† it is expressly referred to as establishing the point that an executor may give a preference after a suit instituted.

I am bound therefore by this authority to allow the exceptions in this case.

[Note.—The following explanation of a difficulty which, at first sight, appears to justify the doubt expressed by the Vice-Chancellor as to the correctness of Colles' report of *Lord Orford v. Darston* is taken from the Law Journal report of *Maltby v. Russell*. The difficulty is occasioned by the fact that in Colles' report the debt is stated to have been paid by the executor on the 25th of March, 1793, and the cause is stated to have been heard and the decree made on the 1st of March, 1793. Upon this the Law Journal reporter observes, "It may be worth while to recollect that at the time of the decision of the *Earl of Orford v. Darston*, the year began on the 25th of March. If, therefore, the dates are accurately given, the payment of the debt on the 25th of March, 1793 (the first day of the year), was prior to the 1st of March in the same year (the date of the decree) by more than eleven months."—O. A. S.]

† 1 P. Wms. 295.

WILKINSON *v.* WILKINSON.

(2 Sim. & St. 237—238.)

1825.

March 11.

LEACH, V.-C.

[237]

A testator gave annuities to his trustees for their trouble in the execution of the trusts of his will. The trust property comprised several houses, let at weekly rents. The trustees are justified in paying a person to collect these rents, and do not, on that account, lose their annuities.

JOSHUA WILKINSON bequeathed to his acting trustees for the time being the yearly sum of 5*l.* 5*s.* apiece, so long as they should respectively live and the trusts of his will should continue, as a small recompense for the care and trouble they might have in the execution of the trusts, and appointed them his executors.

Amongst other property, the testator was entitled to about fifty houses in London; thirty-four of which were let at weekly rents. The trustees employed a person to collect those rents. The Master, on their passing their accounts before him, allowed them the salary paid to such collector. An exception was taken to the Master's report on account of that allowance.

Mr. Garratt, in support of the exception, relied on the gift of the five guineas yearly to the trustees as a recompense for their trouble; and also on the general doctrine of the Court, that the office of trustee is gratuitous.

THE VICE-CHANCELLOR:

It does not appear to me that the annuity of five guineas given to each trustee makes any difference in this case. It is given to them as a recompense for the care and trouble which will attend the due execution of their office; and, if it be consistent with the due execution of their office that they should employ a collector to receive the rent, they will still be entitled to the annuity. A provident owner might well employ a *collector to receive such rent; and the labour of such a collection cannot be imposed upon trustees.

[*238]

Exception overruled.

1825.

March 11.

LEACH, V.-C.

[238]

TYLDEN *v.* HYDE.†

(2 Sim. & St. 238—241.)

A testator directed his real and personal property to be sold and divided amongst his sisters; a power to the executors to sell the real property was implied.

THE question in this cause was whether the plaintiffs, who were the executors of the late Sir Samuel Auchmuty, had power under his will to convey to the defendant an estate which they had agreed to sell to him.

The testator, by his will, after giving several specific and pecuniary legacies, disposed of the residue of his property as follows:

“The residue of my property, both landed and personal, I desire may be converted into money, lodged in Government securities, and divided into four parts or shares; the interest of one share to be given, during their lifetime, to each of my sisters Frances Montresor, Juliana Mulcaster, and Jane Tylden, and to my sister-in-law Henrietta Auchmuty; on the death of either or all of my said sisters or sister-in-law that may survive me, or, at my death, if one or more of my said sisters do not survive me, the share set apart for such sister or sisters and sister-in-law to be divided among all the children of my said sister or sisters, and the children of my said sister-in-law by my brother Robert Auchmuty, with the exception of his second son Robert Mulcaster *Auchmuty, in the following manner: two thirds of such share or shares to be equally divided among the sons of my said sisters and sister-in-law, and one third equally amongst the daughters. I request that Richard Tylden, Esq. and my nephew Sir Henry, and Major-General Sir Thomas Montresor, Captain Mulcaster, Royal Navy, and Sir John and Major William Tylden, will act as executors to this my last will and testament.”

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Three only of the executors proved the will and acted in the trusts of it. In pursuance of those trusts, they sold some of the testator's real estates to the defendant, who afterwards took objections to the title, and refused to complete his purchase,

† *Forbes v. Peacock* (1843) 11 M. & W. 630.

upon which the present bill was filed. On the title being referred to the Master, he reported that the plaintiffs could make a good title to the estates, and that they could, by themselves, without the concurrence of any other party, legally and effectually convey the same to the defendant.

TYLDEN
v.
HYDE.

To this report the defendant excepted.

Mr. Sugden and Mr. Jacob, in support of the exceptions :

The question as to a power to sell real estates being given, by implication, to executors, was discussed in *Bentham v. Wiltshire*.† Where the money to be produced by the sale is not dedicated to the payment of debts, the executors have no power to sell real estates. [In *Patton v. Randall*,‡ the MASTER OF THE ROLLS held that the executor had not power to sell the real estate.]

Mr. Horne and Mr. Boteler, for the plaintiffs, were stopped by the COURT. [241]

THE VICE-CHANCELLOR :

Where there is a general direction to sell, but it is not stated by whom the sale is to be made, there, if the produce of the sale is to be applied by the executors in the execution of their office, a power to sell will be implied to the executors.

Here the produce of the sale is to be confounded with the personal property, which must necessarily be divided by the executors ; and, by the rule which I have stated, a power to sell is therefore implied to the executors.

Exceptions overruled.

† 20 E. R. 271 (4 Madd. 44).

prevented any implication of a power of sale in the executors.—O. A. S.

‡ 1 J. & W. 189. There was an express devise in that case, which

1825.

*March 14.**June 1.*

LEACH, V.-C.

[244]

HARTLEY v. RUSSELL.†

(2 Sim. & St. 244—253; S. C. 3 L. J. Ch. 146.)

Where a creditor who had instituted proceedings at law and in equity against his debtor enters into an agreement with the debtor to abandon those proceedings and give up his securities, in consideration of the debtor giving him a lien on securities in the hands of another creditor, with authority to sue such other creditor and agreeing to use his best endeavours to assist in adjusting his accounts with the holder of the securities, and in recovering his securities: Held, that the agreement does not amount to champerty, but would have done so if it had stipulated that the creditor should maintain the proceedings instituted by the debtor against the holder of the securities, in consideration of the profits to be derived by the debtor from the suit.

THIS was a suit for the specific performance of an agreement.

The bill was filed on the 7th of August, 1824, and stated that, on the 12th of February, 1824, the defendant Joshua Russell filed his bill in this Court against the defendant James Collins, a solicitor of the Court, setting forth that in the years 1811 and 1812 he, Russell, was extensively engaged in the sale and purchase of estates; and that, in the beginning of the year 1812, he had occasion to borrow the sum of 1,000*l.*, and applied to the defendant Collins, who agreed to lend him that sum upon the security of a mortgage; that a mortgage was accordingly prepared for securing repayment of 1,000*l.* and interest on certain estates, and that Collins charged 55*l.* for the expenses of preparing the mortgage deed, and 150*l.* as his commission for lending the money; and, instead of *paying the 1,000*l.* to Russell, paid him only 795*l.*, being what remained after deducting these charges; that afterwards, in the same year, Russell wanted to borrow the further sum of 600*l.*, and again applied to Collins, who agreed to lend it upon the security of another mortgage, and, accordingly, prepared a mortgage-deed for that purpose; and, after deducting the sum of 39*l.* for the expenses of preparing this deed, and 90*l.* as his commission for lending this further sum, paid over to Russell the sum of 477*l.* only instead of 600*l.*, and took the mortgage to secure repayment of 600*l.* and interest at 5 per cent.; that Russell employed and consulted with Collins

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† *James v. Kerr* (1888) 40 Ch. D. 449, 58 L. J. Ch. 355.

as his confidential solicitor, and that various pecuniary transactions afterwards took place between them by discounting bills and by Collins lending him money, and that, from time to time, securities were taken by Collins for the sums in which Russell was so indebted to him, and that annuities were also granted by Russell to Collins, and that, in the accounts made up from time to time by Collins of the transactions between them, there were many improper charges, and many sums paid by Russell for which no credit was given, and that the accounts were made with improper rests, so as to charge compound interest against Russell; that in 1817 a commission of bankrupt was awarded against Russell, and that Collins was a mortgagee, under the various securities already mentioned, at the time of the bankruptcy, and alleged that large sums were due to him, but never attempted to prove any debt under the commission; that, soon after Russell had obtained his certificate under the commission, he entered into an agreement with his assignees to take upon himself the settlement of all his accounts with Collins, and the assignees agreed to convey to him all his equity of redemption *under the various mortgages which he had executed to Russell, and this agreement was authorised by the creditors at a meeting called for the purpose, and deeds were executed by which the agreement was carried into effect, and that Russell was thus entitled to any balance which might, upon a just settlement of accounts, appear to be due from him to Collins at the time of the bankruptcy; that Collins knew of this agreement and adopted it, and carried on and continued his transactions and accounts with Russell as if he had not become a bankrupt, and, in 1821, 1822 and 1823, delivered to Russell various statements of account and bills of costs containing exorbitant and improper charges, but that they were not signed; and praying that Collins might be decreed to deliver in, and sign, proper bills of costs; that such bills might be taxed, and that an account might be taken of all the dealings and transactions between Russell and Collins, and that Russell might be let in to redeem the mortgaged estates upon payment of what should be found due on taking the accounts.

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v.
RUSSELL.

[*246]

The present bill then stated that, on the 16th of February,

HARTLEY 1824, which was only four days after the first bill was filed, the
v. plaintiff James Hartley, entered into the following agreement
RUSSELL with the defendant, Russell.

[*247] “Whereas the said James Russell is and stands indebted to the said J. Hartley, in the sum of 250*l.* for money lent and advanced by said J. Hartley to and for the use of said J. Russell, together with interest thereon from the 23rd day of March, 1823, and costs, and, as a security for the repayment thereof, the said J. Russell and also Edward Wildes signed an undertaking *to execute to the said J. Hartley a transfer of a mortgage-debt due to them on an estate at Maidstone; and whereas the said J. Russell is indebted to the said J. Hartley in the further sum of 250*l.* on a bill of exchange dated the 20th of December, 1822, drawn by the said J. Russell upon and accepted by one J. Hopgood, and payable three months after date, together with interest thereon from the 23rd day of March, 1823, and costs, which said bill of exchange the said J. Hartley hath proved under a commission of bankrupt issued against the said J. Hopgood, but no dividend hath been received under the said commission; and whereas the said J. Hartley hath commenced proceedings at law against the said J. Russell to compel payment of the two several sums of 250*l.* and 250*l.*; and hath also instituted a suit in equity against the said J. Russell and Edward Wildes to compel a specific performance of his said undertaking, and the same are now pending; and whereas the said J. Russell hath, for many years past, had various dealings and transactions with James Collins, of Spital Square in the county of Middlesex, solicitor, and, in the course of such dealings and transactions, the said J. Collins hath advanced to the said J. Russell divers sums of money, for securing which the said J. Russell hath, from time to time, deposited with the said J. Collins various deeds and other securities to a large amount, and, in the course of such dealings and transactions as aforesaid, the said J. Collins hath acted as the attorney and solicitor of the said J. Russell, and the said J. Collins hath made out and delivered to the said J. Russell several bills of fees and disbursements for a large amount, which the said J. Russell conceives to be extravagant and overcharged,

[*248] and the said J. Collins hath commenced proceedings at *law

against the said J. Russell, to recover the alleged balance of his account; and whereas the said J. Russell hath requested the said J. Hartley to institute proceedings against the said J. Collins for an account of the various dealings and transactions between them, and for the delivery to the said J. Russell of the various deeds and securities in the possession of the said J. Collins, and to tax his several bills of costs; and whereas the said J. Russell hath requested the said J. Hartley to relinquish his claim on the mortgage-debt secured on the estate at Maidstone, and to deliver up the title-deeds thereto to the said E. Wildes, and to suspend all further proceedings at law and in equity in respect of the said two several sums of 250*l.* and 250*l.*, and, in consideration thereof, the said J. Russell hath proposed to execute such deed or instrument as may be deemed necessary to give to the said J. Hartley an effectual lien on the several securities now in the hands of the said James Collins, for the securing to the said J. Hartley the payment of the said two several sums of 250*l.* and 250*l.*, together with interest or costs due or to accumulate thereon, which he the said J. Hartley hath consented and agreed to do, and to liberate the said J. Russell from custody in respect of the said actions: now these presents witness that, for the considerations hereinbefore mentioned, the said J. Russell doth, for himself, his heirs, executors and administrators, hereby covenant, promise and agree with the said J. Hartley, in manner following (that is to say) that he the said J. Russell, his heirs, executors and administrators shall and will, when hereunto required, execute to the said J. Hartley, such further deed or instrument, as may be deemed necessary or requisite, for giving effect to the lien on the securities now in the hands of *the said J. Collins for securing to the said J. Hartley the payments of the said two several sums of 250*l.* and 250*l.*, together with all interest due and to accrue due thereon, and all costs and charges and expenses incurred or to be incurred in respect thereof: and the said J. Russell doth hereby further covenant, promise and agree with the said J. Hartley, that he the said J. Russell shall not nor will impede or obstruct the said J. Hartley in taxing the bills of costs, and obtaining and balancing the accounts of the said J. Collins, nor shall not nor will

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RUSSELL.

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execute any release to the said J. Collins, nor do any other act whatsoever to prevent the said J. Hartley from procuring the securities now in the possession of the said J. Collins, but shall and will use his best endeavours to assist the said J. Hartley to adjusting and balancing the account of the said J. Collins, and obtaining the securities in his hands : and, for the consideration hereinbefore contained on the part of the said J. Russell, the said J. Hartley doth hereby agree to sign a discharge to the said actions : and it is hereby further agreed, between the said parties hereto, that all dividends or sums of money which may be received under the commission of bankrupt against J. Hopgood shall be accounted for by the said J. Hartley with the said J. Russell : and lastly, for the performance of this agreement on the part and behalf of the said J. Russell, he the said J. Russell doth hereby bind himself, his heirs, executors and administrators unto the said J. Hartley, his executors, administrators and assigns in the penal sum of 600*l*."

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The bill then stated that the plaintiff had, in all respects, performed the agreement on his part ; but that Russell had colluded with Collins for the purpose of depriving *the plaintiff of the benefit of the agreement ; and that Russell intended to dismiss his bill against Collins, and to release the equity of redemption of the various mortgages, and to impede and obstruct the plaintiff in taxing Collins's bills of costs, and in the settlement of his accounts : and it prayed that the agreement between Russell and the plaintiff might be decreed to be specifically performed, and that the plaintiff might be decreed to be entitled, under the agreement, to the benefit of the suit instituted by Russell against Collins, and that both Russell and Collins might be restrained by injunction from dismissing the bill in that suit, and from executing any releases or deeds contrary to the agreement between Russell and the plaintiff, and for general relief.

To this bill the defendants Russell and Collins put in general demurrers.

Mr. Pemberton, in support of the demurrers :

The agreement of which the plaintiff seeks to have a specific performance, is such as cannot be countenanced or acted upon

by the Court. Any agreement to maintain a suit for the sake of benefits to the attorney in prosecuting the suit, is illegal. *Wood v. Downes* † is a case in which an agreement of the same nature was held to be void, and was decreed to be cancelled.

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RUSSELL.

Mr. Wakefield, for the bill :

Unless the Court is prepared to hold that an equity of redemption cannot be assigned, or that a party who files a bill to redeem a mortgage is thereby restrained *from creating any further incumbrance on the equity of redemption, the plaintiff must be held to be legally entitled to the specific performance of the agreement set forth in the bill. The mortgages were taken for advances from time to time for nominal sums, but subject to an account of the sums actually advanced. It would be a new doctrine to hold that, because the mortgages are of that nature, the mortgagor cannot deal with the equity of redemption. Even if the mortgages were usurious, the mortgagor is still equally entitled to the benefit of his equity of redemption, and can have the benefit of it by filing his bill to have the usurious demand cut down.

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Mr. Pemberton, in reply :

This is not at all a simple bill to redeem. The object of the first suit is to have accounts opened, and to have transactions rescinded on the ground of usury. The agreement is to give to Hartley the benefit of prosecuting that suit. The plaintiff in a suit may give an assignment of the rights for which he sues, and leave the assignee to prosecute those rights. But this is an agreement which gives a right to prosecute one particular suit, and to continue a litigation the expenses of which are to be defrayed out of the fund. It is all one agreement: and, if not good in every part of it, it must fail altogether. So far as it gives the right to prosecute that suit it savours of champerty, and is illegal.

THE VICE-CHANCELLOR :

The agreement in question recites that Russell, being indebted

† 11 R. R. 160 (18 Ves. 120).

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to Hartley in two sums of 250*l.* each and interest, secured in manner therein mentioned, and that Hartley having instituted proceedings, both at law and *in equity, to enforce the payment of the monies due to him, it had been agreed between Hartley and Russell that Hartley should give up his present securities, and should abandon his proceedings at law and in equity, in consideration that Russell would give him an effectual lien on the several securities of Russell which were in the hands of Collins; and it is recited that Russell had requested Hartley to institute proceedings against Collins for an account of the various dealings and transactions between Russell and Collins, and for the delivery to Russell of the various deeds and securities in the hands of Collins, and for the taxation of his costs; and Russell then covenants that he will, when required by Hartley, execute such further instrument as he shall think necessary for giving full effect to his lien on the securities in the hands of Collins, and that he will not impede or obstruct Hartley in taxing Collins's costs, or in settling his accounts, or in doing any other act for obtaining the securities from Collins, but will use his best endeavours and assist Hartley in settling Collins's accounts and in procuring his securities.

There is here, therefore, no bargain, or colour of bargain, that Hartley shall maintain the suit instituted by Russell against Collins in consideration of sharing in the profits to be derived to Russell from the success of that suit, which is essential to constitute champerty. It is, in effect, nothing more than an agreement by Russell to assign to Hartley his equity of redemption in the securities held by Collins, in exchange for the prior securities which Hartley had held. The covenant that Russell would not impede or obstruct Hartley in the taxation of Collins's costs, and in the settlement of Collins's accounts, and the recital that Russell had requested *Hartley to carry on proceedings against Collins, import the intention of the parties that Hartley should have authority to act against Collins as the attorney and in the name of Russell. But this is a legal and common provision in the case of the assignment of a debt or security.

The specific relief sought by this bill is, however, extremely singular; that Russell shall not dismiss his bill against Collins

and that neither Russell nor Collins shall do any act in contravention of the agreement between Hartley and Russell. The plaintiff ought, as assignee of the equity of redemption of the securities of Russell in the hands of Collins, to have prayed the accounts of all transactions between Russell and Collins, and a redemption by the plaintiff upon payment of what should be due in case Russell should not pay to the plaintiff the amount of what was due to him from Russell.

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RUSSELL.

But the question upon demurrer is, not whether the plaintiff is entitled to all the relief prayed, but whether, upon the case made by the bill, he may, under the prayer for general relief, be entitled to some relief.

These demurrers must therefore be overruled.

GILBERT v. WETHERELL.

(2 Sim. & St. 254—259; S. C. 3 L. J. Ch. 138.)

1825.
March 18, 19.
LEACH, V.-C.
[254]

A father lent a sum of money to his son to enable him to engage in trade, and took his promissory note for it; and afterwards persuaded his son to continue the trade against his inclination, whereby the son suffered great losses. The father on his death-bed caused the promissory note to be burned, and died intestate: Held, that the burning of the note amounted, in equity, to a release of the debt, and that the sum which remained due upon it was an advancement to the son.

THOMAS WETHERELL died intestate, leaving the plaintiff Mary the wife of P. Gilbert, and the defendants Charles and Thomas Wetherell, his three children and only next-of-kin. This suit was instituted for the administration of his estate.

By the decree made at the hearing of the cause it was referred to the Master to inquire whether the intestate made any advancements to his children, and under what circumstances they were made, with liberty to state special circumstances and to make a separate report.

The following facts appeared by the examinations taken before the Master, under the decree. In November, 1805, the intestate lent the defendant Thomas Wetherell 10,000*l.* to assist him in forming a partnership in the business of a sugar refiner, and took his promissory note for the repayment of that sum on

GILBERT
v.
WETHERELL. demand. Thomas Wetherell, from time to time, paid various sums, amounting altogether to 3,538*l.*, in reduction of the 10,000*l.* On the 31st of December, 1811, he signed an account which stated a balance of 9,128*l.* 7*s.* 6*d.* to be then due from him to the intestate. In the year 1812, owing to heavy losses which he had sustained in a separate trade carried on by him, he was obliged to stop payment, and, to prevent a commission of bankrupt being sued out against him, assigned over all his stock in trade and other convertible property for the *benefit of his creditors, on their agreeing to give him time for the liquidation of their various demands. A great part of the stock in trade thus assigned, consisted of sugars which, from the then state of the market, could not be sold but at very great disadvantage; but it was hoped that sufficient time would be given to have it advantageously disposed of. Before, however, a favourable change took place in the markets, the creditors became so urgent for the immediate conversion of the property into money, that, in order to avoid the loss which an immediate sale would have occasioned, the intestate, to relieve his son, made an arrangement with the creditors, by which he accepted bills of exchange for the full payment of their several debts, with interest, by four instalments; and the whole of the sugar and other property of the son was transferred and delivered over to the father. The whole property thus transferred to the intestate was sold under the most favourable circumstances which the situation of the parties admitted of; but, instead of any surplus remaining to go in diminution of the debt due to the intestate himself, he remained greatly in advance, on account of the payments made by him to the creditors.

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On the 12th of March, 1814, which was about ten days previous to his death, and during his last illness, the intestate desired his daughter, the plaintiff Mary Gilbert, who was in attendance upon him, to bring him his pocket-book; which she accordingly did. The intestate then took the promissory note for 10,000*l.* out of the pocket-book, and put it into the hands of Mrs. Gilbert, and desired her to burn it, which she immediately *did in the intestate's presence. When it was burnt, the intestate said, "Now Thomas owes me 11,000*l.*"

Thomas Wetherell, in his examination before the Master, stated that it was in consequence of the urgent desire of the intestate that he had engaged in the business of a sugar refiner; and that in August, 1809, finding that it was a losing concern, he became desirous of retiring from it; but that the intestate urged him to continue it; that, at the earnest desire and entreaty of the intestate, and to his own manifest disadvantage, he, after much hesitation, continued the business, and sustained such heavy losses in it, that, in November, 1811, his share of the losses exceeded the amount which remained due in respect of the promissory note for 10,000*l*. He also stated that the intestate, when he took a transfer of all his stock in trade, agreed to take the surplus (if any) after payment of all the other creditors, in discharge of the debt due to himself; and that this arrangement was always looked upon, and spoken of by the intestate, as an extinguishment or satisfaction of the debt due to him; that the burning of the promissory note on his death-bed was evidence that he considered it satisfied; and that the intestate, at various times, in conversations with different persons, acknowledged that the examinant's losses in trade were owing to his (the intestate's) fault and obstinacy, as he would have the examinant persist in continuing the trade, contrary to his own inclination: but that the examinant should not be a sufferer. Several witnesses examined in the cause on behalf of the examinant, proved that the intestate had used some such expressions in conversation.

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WETHERELL.

The Master, by his separate report, stated that the plaintiffs had brought in a charge against the defendant Thomas Wetherell, by which they charged that he had received from the intestate, his father, in his lifetime, several sums of money by way of advancement, and that on the 31st of December, 1811, the defendant Thomas Wetherell signed an account, by which it appeared that the sum of 9,128*l*. 7*s*. 6*d*. was then due from him to the intestate; but the Master reported that this sum of 9,128*l*. 7*s*. 6*d*., or any part of it, was not an advancement by the intestate to the defendant Thomas Wetherell, within the 22 & 23 Charles II. c. 10.†

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† Misprinted 19 in the original report.

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v.
WETHERELL. Exceptions were taken to this report: but, when they came on to be argued, the Master had not made his general report; and, on its being suggested that the Master, though he had not reported the sum of 9,128*l.* 7*s.* 6*d.* to be an advancement, might report it to be a debt due from the defendant Thomas Wetherell to the intestate's estate, the exceptions were ordered to stand over until the Master should have made his general report.

The Master did not, by his general report, state this sum to be a debt; and exceptions were also taken to the general report.

The exceptions to the Master's reports now came on to be argued.

[*258] *Mr. Sugden* and *Mr. Stuart*, for the plaintiffs, and *Mr. Horne* and *Mr. Garratt*, for the defendant Charles Wetherell, in support of the exceptions, insisted that *the 10,000*l.*, or what remained unpaid in respect of it, must be considered, either as an advancement by the intestate to the defendant Thomas Wetherell, or as a debt due from Thomas Wetherell to the intestate's estate; that the burning of the promissory note did not amount in law to a release of the debt; that, as to the losses in the sugar refining business, the intestate did not mean to consider them as affecting the debt due to him; because the account stated in November, 1811, by which the balance of 9,128*l.* 7*s.* 6*d.* appeared in favour of the intestate, was stated after those losses had occurred; that, there having been not only no surplus remaining towards payment of the debt to the intestate after he had paid the other creditors out of his own monies, but an increase of the debt due to him, it was impossible to consider the transfer of the stock in trade to him as a satisfaction of the debt; and that, if the burning of the note could be held to amount in equity to a release of the debt, it must then be considered to be an advancement.

Mr. Heald and *Mr. Roupell*, for the defendant Thomas Wetherell, insisted that the whole transaction and the expressions used by the intestate, shewed that he considered the debt as satisfied, and not chargeable, in any shape, against Thomas Wetherell; and therefore, that the Master had rightly reported that it was neither a debt nor an advancement.

The VICE-CHANCELLOR said he must hold that the circumstances under which the note had been destroyed amounted to an equitable release of the debt; but that the sum of 9,128*l.* 7*s.* 6*d.* the balance which appeared *due, in respect of the sum for which the note was given by the account stated in December, 1811, was to be considered as an advancement.

The decree allowed those exceptions which proceeded on the ground that the 9,128*l.* 7*s.* 6*d.* had not been reported an advancement; referred it to the Master to take an account of what was due from Thomas Wetherell to the intestate at his death, and directed him to take the balance of 9,128*l.* 7*s.* 6*d.* on the stated account, as part of the debt; and declared that the amount of the debt at the testator's death was an advancement to the defendant Thomas Wetherell.

* * * * *

GRAY v. CHAPLIN.

(2 Sim. & St. 267—273; S. C. 3 L. J. Ch. 47.)

1825.

April 16, 27.

LEACH, V.-C.

[267]

One of the shareholders of a canal is entitled to file a bill on behalf of himself and the other shareholders, to set aside an agreement made by the commissioners of the canal contrary to the provisions of the Act under which the canal was made; because whatever benefits may be reserved to the shareholders by the agreement, they must all be considered as being interested in having the directions of the Act complied with.

[THIS decision was reversed by Lord ELDON, L.C. on appeal, as reported in 2 Russell, 126, on the ground that the shareholders were estopped by acquiescence from impeaching an agreement which had been allowed by them to remain in operation for their own benefit for 47 years. The report of the appeal containing a note of the VICE-CHANCELLOR's judgment will be given in 26 R. R.—O. A. S.]

1825.
April 18.

LOGAN *v.* FAIRLIE.

(2 Sim. & St. 284—295; S. C. 3 L. J. Ch. 152.)

[291]

Where a testator dies in India, leaving personal estate there only, and his executors reside and prove his will there, no duty is payable on a legacy remitted to a legatee in England.

[In this case the VICE-CHANCELLOR said :]

If a testator die in India, and his personal estate be wholly in India, and his executor be resident there, and the will be proved there, and the executor remit to a legatee in England, or to some other person in England for the specific use of the legatee, the amount of his legacy, I am of opinion that the legacy-duty is not payable upon such remittance, inasmuch as the whole estate is administered in India, and the remittance is in respect of a demand which is to be considered as established there. But if a part of the assets of the testator is found in England, in the hands of the agent of such executor, without any specific appropriation, and a legatee in England institute a suit here for the payment of his legacy out of such unappropriated assets, then such assets are to be considered as administered in England, and the legacy-duty is payable in respect of them.

[The actual decision in this case proceeded upon the ground that there had been no such appropriation as to exclude the liability to legacy duty in England. The decision was reversed by the Lords Commissioners in 1835, as reported in 1 Mylne & Craig, 59, but the reversal turned upon the question of fact, and expressly recognised the accuracy of the proposition of law here laid down, which had been fully established in the meantime by the decision of the House of Lords in *A.-G. v. Jackson* (1834) 8 Bligh (N. S.) 15.—O. A. S.]

HEMMING *v.* GURREY.

(2 Sim. & St. 311—321.)

Held, that a second will was made, if not wholly, yet, as to the greater part, in substitution of the first, from the similarity of the form and expressions of the two instruments, and of the annuities and legacies, and from the gifts of two estates specifically devised.

[THIS decision was affirmed by the House of Lords on appeal under the title of *Heming v. Clutterbuck*, as reported in 1 Bligh (N. S.) 479. The report of the appeal will be found in a later volume of the Revised Reports.—O. A. S.]

1825.

May 5.

LEACH, V.-C.

[311]

On Appeal.

1827.

June 18.WRIGHT *v.* ROSE.

(2 Sim. & St. 323—325.)

Where a mortgage deed contains a power of sale, with a direction that the surplus produce shall be paid to the mortgagor, his executors and administrators, if a sale takes place in the lifetime of the mortgagor, the surplus is personal estate; but if after his death, it is real estate.

LEACH, V.-C.

[323]

THE bill stated that Joseph Wright was seised in fee of a freehold estate; that he borrowed 800*l.* from James Rose, the defendant, and secured the repayment of it, with interest, by executing a mortgage deed of the estate, with a power of sale; and that, by the terms of the deed, it was provided that the surplus monies to arise from the sale, in case the same should take place, were to be paid to Wright, his executors or administrators.†

In 1822, Wright died intestate, and without ever having been married. All the interest due on the mortgage *money had been duly paid by him up to the time of his death, but the principal remained unpaid. The interest that accrued due after his death having remained unpaid, Rose, the mortgagee, entered into possession, and afterwards sold the estate under the power of sale, for a sum which considerably exceeded the mortgage money and interest.

[*324]

Joseph Wright, the mortgagor, was an illegitimate child, and,

† It did not appear on the face of the bill to whom the right of redemption was reserved.

WRIGHT
v.
ROSE.

having died without issue, a claim was set up on the part of the Crown to the mortgaged estate. But, on inquiry being made as to the value of the property, it was found to be subject to the mortgage, and the claim was abandoned: and, after the sale, letters of administration of the estate of Joseph Wright were granted to the plaintiffs.

The bill, after setting forth these facts, and alleging that a large surplus remained in the hands of the defendant, Rose, after satisfying the mortgage debt and interest, prayed that an account might be taken of the monies produced by the sale, and of the amount due in respect of the mortgage; and that the defendants might be decreed to pay over the surplus to the plaintiffs as the personal representatives of Joseph Wright.

To this bill the defendant put in a general demurrer for want of equity, which now came on to be argued.

Mr. Cooper for the bill.

Mr. Koe for the demurrer.

THE VICE-CHANCELLOR:

[*325] If the estate had been sold by the mortgagee in the lifetime of the mortgagor, then the surplus monies *would have been personal estate of the mortgagor, and the plaintiffs would have been entitled. But the estate being unsold at the death of the mortgagor, the equity of redemption descended to his heir, and he is now entitled to the surplus produce.

Demurrer allowed.

1825.

May 9.
June 1.

LEACH, V.-C.

[340]

DRINKWATER v. COMBE.†

(2 Sim. & St. 340—346; S. C. 3 L. J. Ch. 178.)

If a tenant of an estate, subject to an executory devise, pays off a charge upon the estate, and the executory devise afterwards takes effect, his executors will be entitled to be repaid the amount of the charge.

WILLIAM COMBE, being possessed of a leasehold estate for a long term of years, situate at Great Hampton, in the county of

† *Re Pride*, '91, 2 Ch. 135, 61 L. J. Ch. 9.

Worcester, by his will, dated the 19th of February, 1760, bequeathed it to his son Francis Combe, for all such estate as he, the testator, had therein. He then bequeathed to his son *Joseph the sum of 300*l.*, to be paid to him at his age of twenty-one years, and to his daughter Hannah Sansom, the sum of 80*l.*, to be paid her within six months next after his decease, and he charged his leasehold estate with the payment of those legacies, and with the payment of 10*l.* to his sister-in-law Winifred Combe, yearly, during her life. And, in case Francis Combe should happen to die unmarried, he gave the leasehold estate to his other two sons, William and Joseph Combe, their executors, administrators and assigns, as tenants in common, subject to the payment of the legacies and annuity: and he appointed his wife, Ann Combe, and his son, William Combe, executrix and executor of his will.

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Upon the decease of the testator, Francis Combe entered into possession of the leasehold estate, and continued in possession until his death. He paid the legacy of 300*l.* to Joseph Combe, and the legacy of 80*l.* to Hannah Sansom; and, during the life of Winifred Combe, he paid her the annuity of 10*l.*

An Act of Parliament was passed in the sixteenth year of the reign of his late Majesty, intituled, "An Act for dividing and inclosing the Open and Common Fields, and all other Commonable Land, within the Parish of Great and Little Hampton, in the County of Worcester," by which the several owners and proprietors for the time being of any of the lands thereby directed to be inclosed, being tenants in tail, or for life or lives only, were empowered, with the consent of the Commissioners appointed to carry the Act into execution, to be testified in writing under their hands and seals, either in and by their award, or in and by any deed or instrument to be executed by them, either before or after the execution of their said award, from *time to time to charge the lands, which should be allotted to such owners or proprietors, or persons entitled as aforesaid respectively, with any sum or sums of money not exceeding 40*s.* for each acre, to be applied for the purposes of defraying their respective proportions of the charges and expenses of passing the Act, and other necessary charges incident to and attending such inclosure and division,

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and the necessary subdivisions of their respective allotments, and to mortgage such lands for a term of years to secure the repayment of such respective sums of money with interest. Accordingly the commissioners, by their award, dated the 2nd of April, 1777, allotted forty-four acres of land to Francis Combe, in respect of the leasehold premises bequeathed by the testator; and consented and testified that it should be lawful for the owners and proprietors of the lands directed to be inclosed, being tenants in tail, or for life or lives only, to raise, in the manner prescribed by the Act, money for defraying their proportions of the charges and expenses before mentioned, which the Commissioners certified amounted in the whole to 1,528*l.* 8*s.* 11*d.*, and directed to be paid on or before the 10th of April then instant.

Francis Combe paid his proportion of the 1,528*l.* 8*s.* 11*d.*; but did not exercise the powers, given him by the Act, of charging the estate with it.

William Combe the son, and Joseph Combe, died in the lifetime of Francis Combe, intestate.

Francis Combe died in April, 1821, unmarried. The plaintiffs were his executors.

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The personal representatives of Joseph Combe and William Combe recovered the possession of the leasehold premises in an action of ejectment brought against the plaintiffs.

The bill prayed that the leaseholds might be sold, and that the sums paid by Francis Combe in discharge of the legacies and the expenses of the inclosure might be paid to the plaintiffs.

Mr. Horne and Mr. Lynch, for the plaintiffs :

* * If a tenant in tail, under a gift from the Crown, pays off a charge, he is entitled to be reimbursed by a charge upon the estate; because he can never acquire the fee.[†] That is an analogous case to the present one. * * When the Inclosure Act passed, he was only tenant for life, and consequently was empowered by that Act to charge the expenses of the inclosure upon the estate. He did not avail himself of the power, because he considered himself *to be the absolute owner of the estate. But we submit that the plaintiffs are now entitled to be repaid

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[†] 2 R. R. 101.

the expenses out of the estate. As to the legacies, the testator himself contemplated that if the estate went over, it would still be subject to them. *Ware v. Polhill*.†

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Mr. Ellison, for the defendant :

* * In *Jones v. Morgan*,‡ Lord THURLOW qualifies the rule as to charges paid off by a tenant for life. He says, that the smallest demonstration that he meant to pay off the charge will prevent his representative from coming for the money. Here these expenses were paid forty-three years ago, and Francis Combe did no act to shew that he meant to charge the estate. *Countess of Shrewsbury v. The Earl of Shrewsbury*.§ *Redington v. Redington*.|| The reasoning in this latter case applies to the present one. Francis Combe might at one time have intended to marry, and then his estate would have become indefeasible.

THE VICE-CHANCELLOR :

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I am not aware that the points here argued have ever been decided. If a tenant for life pays off a charge upon his estate, the amount becomes a part of his personal property, unless he manifests an intention that it should not do so. If a tenant in tail pays off a charge upon his estate, the amount does not become a part of his personal property, unless he manifests an intention that it should do so. He who takes an estate defeasible by executory devise, is not like a tenant for life; because, upon a contingent event, his estate may become indefeasible. Nor is he like a tenant in tail; because he cannot, at his own pleasure, render his estate indefeasible. If tenant in tail, having the power at his own pleasure to acquire an absolute fee, and to defeat the remainder, does not exercise that power, it is reasonable to infer that the remainderman is, in a sense, the object of his own choice, and this is the reason of the rule for presuming, unless the contrary be manifested, that, when the tenant in tail pays off a charge, he means the estate which, in effect, he gives to the remainderman, should descend to him free from the charge. But he who takes an estate defeasible by

† 8 B. R. 144 (11 Ves. 257, 282).

‡ 1 Br. C. C. 206.

§ 2 B. R. 101 (1 Ves. J. 227).

|| 12 B. R. 5 (1 Ba. & Be. 131, 142).

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executory devise, not having the power to defeat the devisee over, it cannot be intended that such devisee is, in any sense, the object of his choice; and there is not, therefore, the same reason for presuming, when he pays off a charge, that he means to give to such devisee the amount of the charge. In this respect, as well as in the quality of his estate, he who takes such defeasible estate is more within the principle that applies to the tenant for life. So, like a tenant for life, he may be restrained from cutting timber, or committing waste.

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Declare, therefore, that the plaintiffs are entitled to have the charge raised. With respect to the expenses of the inclosure, they are, in their nature, a charge upon the *corpus* of the estate, and fall within the same equitable principle as an actual charge, and must be repaid to the plaintiff.†

1825.

May 9.
June 19.
July 5.

GARDNER v. ROWE.

(2 Sim. & St. 346—354; affirmed on appeal, 5 Russell, 258—263; S. C. 3 L. J. Ch. 220.)

LEACH, V.-C.

On Appeal.

1827.

Nov. 26, 27.

1828.

October.

ELDON, L.C.

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A lease was granted to W., who afterwards committed an act of bankruptcy, and then executed a declaration of trust in favour of R. On the trial of an issue directed by the Court, it was found that W.'s name was used in trust for R.: Held, that the lease did not pass to W.'s assignees.

By an indenture dated the 23rd of January, 1812, Lord Mount Edgecumbe granted to George Wilkinson of Newcastle-under-Lyme, liberty to dig for tin and other metals and minerals, for twenty-one years, in a piece of ground called the Wheal Regent Sett. On the 23rd of August, 1813, Wilkinson executed a deed, declaring that he was a trustee of the lease for the defendant Rowe. Wilkinson, before he executed this deed, had committed an act of bankruptcy; and, in November following, a commission of bankrupt was issued against him, under which he was found a bankrupt. The plaintiffs were his assignees.

At the hearing of the cause, Rowe contended that the lease was granted to Wilkinson, in trust for him; and the Court directed an issue to be tried, to ascertain whether that was the fact. The jury found a verdict in the affirmative. The cause

† See *Wigsell v. Wigsell*, post, p. 224.

now came on to be heard, for further directions on the equity reserved. The following passages in letters written by Wilkinson to Rowe before the granting of the lease, but after the latter had taken possession of the piece of ground in question under an agreement with Lord Mount Edgecumbe, and *had begun to dig a shaft in it, were set forth in Rowe's answer. "19th October, 1811,—I am much pleased to hear you are likely to find a bed of mine upon your new set; I conclude in the shaft you had begun to work when I was upon the premises. I sincerely hope it will prove fortunate in the extreme." "5th of January, 1812,—I received your's last night, and, since you have left this place, I have received a letter from Captain Clemens, saying he had made application to Mr. Coode for the deeds of Wheal Regent Mine. He tells me they are done, but must be sent to be signed by the Earl of Mount Edgecumbe, and then they will be sent to Newcastle."

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Rowe having afterwards written to Wilkinson to give him directions as to the working of the mine, received an answer from him as follows: "9th January, 1812,—I received your's this night, and I shall, of course, pay strict attention to it in every respect you may depend."

Mr. Agar, Mr. Rose, and Mr. Matthews, for the plaintiffs :

The declaration of trust, as it was executed after the bankruptcy, is nugatory; for it is quite clear, from the principles of the bankrupt laws, that, after an act of bankruptcy, the bankrupt is incapable of transferring his property. No act of his, done after the act of bankruptcy, can affect his assignees. The commission has relation to the act of bankruptcy, and avoids every subsequent transfer of property. * * *

The Solicitor-General, Mr. Montagu, Mr. Pepys and Mr. Knight, for the defendant Rowe :

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The language used by the Legislature, in the fourth section of the Statute of Frauds, is very different from that in the seventh. By the former, the agreement itself is required to be in writing; the latter merely enacts that all declarations of trust shall be manifested and proved by some writing signed by the party, who

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is enabled by law to declare such trust. It is not required that a trust shall be created, but merely that it should be proved by writing: *Forster v. Hale*.† * * Nor does the statute fix any time beyond which a trust cannot be declared: it may be evidenced in writing at any time after its creation. If the bankrupt, upon his examination, had denied the trust, he might afterwards have declared it by his will. Now it has been established by the finding of the jury, that the lease was taken for Rowe's benefit, and that Wilkinson's name was used in trust for Rowe at the time of the bankruptcy; therefore Rowe had a right to call on Wilkinson to execute a declaration of trust in his favour. The question then is, did Wilkinson's bankruptcy prevent him from declaring the trust? * * Here Rowe advanced all the money for working the mine. Wilkinson suffered Rowe to go on in exercise of his right, and corresponded with, and treated him throughout as the owner of the mine. Under these circumstances this Court will not hear Wilkinson, or any *person claiming under him, say that the lease is his: *Norway v. Rowe*.: By allowing such a claim to prevail, the Court would permit the Statute of Frauds to be used for the purposes of fraud. The principle upon which the cases as to part-performance have been decided, ought to be applied to the present case. Should, however, the Court be of opinion that the declaration of trust executed by the bankrupt after his bankruptcy did not prevent the lease from passing to the assignees, then we submit that the letters are a sufficient declaration of the trust in writing.

THE VICE-CHANCELLOR:

On the 1st of January, 1812, the Earl of Mount Edgecumbe, by indenture of that date, granted to the bankrupt George Wilkinson the lease or set of a certain mine, called the Wheal Regent Mine, for a term of twenty-one years, for the considerations therein mentioned; and, by an indenture bearing date the 23rd August, 1813, the bankrupt George Wilkinson, who, at the request of Rowe, had previously assigned five fourteenths to one Brodrick, after reciting that his name was used in the said

† 4 R. R. 128 (3 Ves. 696, 5 Ves. 308).

‡ 12 R. R. 157 (19 Ves. 144.)

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indenture of the 1st January, 1812, as a trustee for Joshua Rowe, assigned and transferred the remaining fifty-nine parts or shares to the said J. Rowe, for the residue of the said term. It is admitted that, prior to this assignment, an act of bankruptcy had been committed by the said George Wilkinson, and that a commission of bankrupt was duly issued against him in the month of November, 1813; and the present bill is filed by the assignees of Wilkinson under that commission against J. Rowe, and certain other persons claiming interest under him in the *Wheal Regent Mine, for the purpose of having it declared that the lease of the Wheal Regent Mine is the property of the bankrupt. On the hearing of this cause the plaintiffs contended that it was established, by the evidence in the cause, that, at the time of the grant from Lord Mount Edgecumbe, it was the purpose of the bankrupt and J. Rowe, that the bankrupt should hold the lease for his own benefit, and not as a trustee for J. Rowe; and the plaintiffs further contended, as a point of law, that if in fact it had been the purpose of the bankrupt and J. Rowe, at the time of the grant from Lord Mount Edgecumbe, that the name of the bankrupt should be used as a trustee for J. Rowe, yet that such trust could not prevail, because there was no written declaration of trust within the Statute of Frauds other than the indenture of 24th August, 1813, which, being executed by the bankrupt after his bankruptcy, could not operate to defeat the claim of his assignees.

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It appeared to me, at the hearing, that I could not properly enter upon the consideration of this point of law, without first coming to a conclusion upon the fact, whether the name of the bankrupt was or not used in the indenture of January, 1812, as a trustee for the defendant J. Rowe, and I directed an issue accordingly. At the trial of this issue, the jury found that the name of the bankrupt was used as a trustee for J. Rowe; and a motion having been made before me by the plaintiffs for a new trial of that issue, I refused to disturb the verdict.

The question which has now been mainly argued before me is, whether the indenture of the 24th *August, 1813, having been executed by the bankrupt subsequent to his bankruptcy, can or not be received as against his assignees as a declaration of trust

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in writing. Upon a consideration of the several cases which have been referred to in the argument, it does not appear to me that any authority has been produced which is directly in point. All the cases establish that a bankrupt cannot, by any act subsequent to his bankruptcy, transfer any interest from his assignees. Thus, a bankrupt cannot defeat the interest of his assignees by a power of appointment. Can the bankrupt be said to have any interest in this mine at the time of his bankruptcy? He might have recovered possession of this mine by force of his legal title; but he would then have recovered, not in respect of his interest, but by converting a statute, made for the prevention of fraud, into an instrument of his own fraud. It is not disputed that this deed of August, 1813, would have prevailed against the assignees, as a declaration of trust, if it had been executed before the bankruptcy. Yet a mere voluntary deed, executed before the bankruptcy, will not prevail against the assignees. This deed, therefore, in respect to the moral obligation on the trustee to give effect to his trust, would not, in such case, have been considered as a mere voluntary deed. If, in respect of the moral obligation affecting the trustee, this declaration of trust would have prevailed against the assignees if executed the day before the bankruptcy, without any other consideration, I cannot find a principle why it should not prevail against the assignees, if executed the day after the bankruptcy, especially when it is considered that a trust does not pass by assignment in the bankruptcy. For these reasons, I am of opinion that the indenture of 24th *August, 1813, though executed after the bankruptcy, is a good declaration of trust in favour of J. Rowe, within the Statute of Frauds. It has been slightly argued that the letters of the bankrupt do manifest a trust in writing within the Statute of Frauds; and further, that a trust in this case is to be implied from the fact that Rowe actually directed the working of the mine, and paid the expenses of it; but I do not think it necessary to give any opinion on these points. The bill must therefore be dismissed, and with costs.

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1827.
Nov. 26, 27.

[The plaintiffs appealed from this order to the LORD CHANCELLOR, who dismissed the appeal (as reported in 5 Russell,

258), saying,† “assuming the bankrupt to have been a trustee for Mr. Rowe, there was nothing I think to prevent him from making a valid declaration of trust notwithstanding his bankruptcy.”]

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FOWLER v. WILLOUGHBY.

(2 Sim. & St. 354—358; S. C. 4 L. J. Ch. 72.)

1825.

July 11.

LEACH, V.-C.

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A pecuniary legacy, directed to be paid by the sale of an estate, which the testator had contracted to purchase, is a demonstrative legacy, and if the contract cannot be completed the legacy is payable out of the testator's general assets.

* * * * *

[In 1805, the testator by his will gave to trustees a sum of 1,400*l.*, to be raised by the sale of an estate] *which he had lately purchased of Mr. Thomas A. Franklin, upon trust to place the 1,400*l.* out upon good security; and, out of the interest thence arising, to maintain and educate his grandson, John Fowler, until he should attain the age of twenty-one years; and, when he should attain that age, he willed that his grandson should receive 800*l.* as his share of the 1,400*l.*; and he gave to his grandson, Thomas Fowler, when he should attain the age of twenty-one years, the remaining sum of 600*l.*, and all the interest and profits which should have arisen from the 1,400*l.* over and above the maintenance and education of his grandson John Fowler; and he gave all the residue of his personal estate to his son Thomas Willoughby, whom he appointed sole executor of his will.

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In 1810, the father of John and Thomas Fowler (who were then infants) filed a bill on their behalf, claiming the 1,400*l.*, against Thomas Willoughby, who insisted that, as the purchase of the estate out of which the money was to be raised had not been completed, the *1,400*l.* was not due. But an agreement was entered into between the father and Thomas Willoughby, by which 200*l.* was paid to the father, on behalf of the infants, in satisfaction of all their claims.

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The father afterwards became insolvent; and John Fowler, having come of age, joined with his brother, who was then an

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LOUGHBY.

infant, in filing this bill against Thomas Willoughby and the trustees.

When the cause came on to be heard, it was referred to the Master to inquire whether the contract of the testator for the purchase of the estate could be enforced against his assets. The Master reported in the affirmative, and the defendants took an exception to the report, which exception the Court allowed, holding that the contract could not be enforced.

The cause now came on for further directions; and the question was, whether the legacy to John Fowler could take effect, although it could not be raised in the manner directed by the testator.

Mr. Agar and Mr. Duckworth, for the plaintiffs :

The doctrine laid down in *Savile v. Blackett*† is quite applicable to this case. Here is a gift of a sum of money, and a particular fund mentioned out of which the testator desires the legacy to be paid; but Lord MACCLESFIELD held that, in such a case, the failure of the fund or *modus* mentioned by the testator is no reason why the substantive gift of the legacy should fail. [*357] *Whittaker v. Whittaker*‡ is to the same effect; for it *was held that a contract, for the purchase of an estate which the testator devised to his nephew, failing, the amount agreed to be paid for it should be laid out in the purchase of other lands, for the benefit of the devisee. Lord ELDON has recognized the same doctrine in *Broome v. Monck*.§

Mr. Horne and Mr. Meggison, for the defendant Willoughby :

This is not a general legacy, but is so far specific as to depend entirely on the fund out of which the testator directs it to be paid. *Page v. Leapingwell* || proves that the gift of a certain sum of money, to be raised by the sale of an estate, is a specific legacy. *Whittaker v. Whittaker* has no application to this case. The question there was entirely upon the will, and there was a clear intention to give an estate of a particular value to the

† 1 P. Wms. 777.

‡ 4 Br. C. C. 31.

§ 8 R. R. 48 (10 Ves. 597).

|| 11 R. R. 234 (18 Ves. 463).

object of the testator's bounty. * * But in this case there is no direction to raise a single shilling for the purchase. * * There being nothing in the will which can make *this 1,400*l.* a charge upon the general assets, it must fail.

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Mr. Parker, for another defendant.

The VICE-CHANCELLOR decreed the legacy to be paid out of the testator's general estate, stating, that this was neither a *legatum nominis*, nor a *legatum debiti*, but a pecuniary legacy with a particular security, which in the civil law was termed a demonstrative legacy, and that our law followed the civil law in giving effect to such a legacy, where the particular security intended by the testator happened to fail.

SMITH v. COWDERY.

(2 Sim. & St. 358—364 ; S. C. 3 L. J. Ch. 205.)

1825.
June 18.
July 12.

A bequest to M. on the day of her marriage with any other person than T., and if she married T. then over. M. married T. in the lifetime, and with the consent of the testator: Held, that she was entitled to her legacy.

LEACH, V.-C.
[358]

WILLIAM YOUNG, by his will, dated the 29th of May, 1792, after giving several legacies, gave all the rest, residue and remainder of his monies, securities for money, stock upon his farms, goods, chattels, real, personal estate and effects, unto his executors, upon trust to pay and divide the same unto and amongst his children, Susannah, the wife of James Neeld, Mary Young, Ann Young, Fanny Young, and William Young, equally between them, share and share alike, when they should respectively attain the age of twenty-one years, or day of marriage, whichever should first happen, and the interest thereof respectively, or so much as might be necessary, to be in the meantime applied towards their support and maintenance, except *Mary Young, whose share of the residue of his personal estate and effects the testator directed should be paid her upon the day of her intermarriage with any other person excepting Henry

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Twynam, and the interest thereof, in the meantime, to be applied towards her support and maintenance: and his will and mind was that, in case Mary Young should at any time thereafter intermarry with Henry Twynam, then upon trust to pay and divide her share of the residue of his personal estate, so given and bequeathed to her as aforesaid, unto and amongst Susannah Neeld, Ann Young, Fanny Young, and William Young, in such manner as before and after directed concerning the residue of his personal estate: * * and, in case any or either of them, Susannah Neeld, Mary Young, Ann *Young, Fanny Young, and William Young, should happen to die without issue lawfully begotten, before his, her or their respective legacy or legacies, share or shares, should become due and payable, then that his executors should pay and divide the legacy and legacies, share and shares of him, her or them so dying, unto and amongst the survivors of Susannah Neeld (in case she should have any issue as aforesaid), but if not, he directed the interest of her share of the part or parts, share or shares of him, her or them so dying, to be paid to James Neeld and Susannah Neeld, for their natural lives, and the life of the longest liver of them, and the principal thereof, in such manner as her share of the residue of his personal estate and effects was before directed, to Mary Young, in case she should not at any time thereafter intermarry with Henry Twynam, Ann Young, Fanny Young, and William Young, in equal proportions, share and share alike, and if but one, then the whole to such survivor: but in case any of them should die before his, her or their legacy or legacies, share or shares should become due and payable, leaving issue lawfully begotten, then that his executors should pay and divide the legacy or legacies, share or shares of him, her or them so dying, unto and amongst the children of him, her or them so dying, equally between them, share and share alike, and if but one, then the whole to such only child.

On the 1st of June, 1795, the testator died. After the date of the will, but in the testator's lifetime, and with his consent, Mary Young married Henry Twynam: and the only question in the cause was, whether she thereby forfeited her share of the testator's residuary estate.

Mr. Agar, Mr. Horne, Mr. Romilly, Mr. Ching and Mr. Jacob, for the parties who were interested in contending for the forfeiture :

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* * The time of payment cannot arrive ; for, unless Mrs. Twynam married with some other person than Henry Twynam, she was not to be paid her share. A will cannot be altered by matter *in pais*. The consent given by the testator cannot have the effect of striking out a clause in the will, and inserting another in lieu of it. No matter *dehors* the will can introduce a new bequest, or strike out an express gift in the will. A will cannot be revoked otherwise than by writing, unless by some act which changes the nature of the testator's interest in the substance of the gift, such as his marriage, and the birth of a child.

Mr. Sugden and Mr. Treslove, for Mr. and Mrs. Twynam :

The Court has struggled, in similar cases, to hold the condition dispensed with, where the marriage was had with the father's consent. *Clerke v. Berkeley*,† *Crommelin v. Crommelin*.‡

* * *Parnell v. Lyon* § is exactly this case ; for it contains an express gift over in case the daughters married without the consent of the executors. *Coffin v. Cooper*.|| In the present case no consent is required ; but there is a gift over in case Mary Young married Mr. Twynam. But when the testator did away with the prohibition, and consented to and assisted in completing the act which it is contended worked a forfeiture, he impliedly revoked the clause. The condition is considered as ceasing when the testator has done an act which virtually strikes the clause out of the will. He was looking to a marriage after his death ; and, therefore, the provisions of his will cannot be applied to one solemnised in his lifetime. *Wheeler v. Warner*.¶ * * *

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Mr. Heald and Mr. Roupell, for other parties.

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THE VICE-CHANCELLOR :

The testator in this case introduces a condition in his will to

† 2 Vern. 720.

|| 12 R. R. 277.

‡ 3 Ves. 227 : see 12 R. R. 278.

¶ 24 R. R. 176 (1 Sim. & St. 304).

§ 12 R. R. 274 (1 V. & B. 479).

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prevent the marriage of his daughter Mary with Henry Twynam. After the making of his will his daughter Mary married Henry Twynam, with his express consent and approbation ; and the condition is thus dispensed with. In coming to this conclusion, I follow the cases of *Clerke v. Berkeley*, *Crommelin v. Crommelin*, and *Parnell v. Lyon*.† In this case it is very questionable, whether, under the language of the will, *the share of the testator's daughter Mary did not vest absolutely at twenty-one, without regard to marriage ; but it is not necessary to pursue that point.

1825.
July 1, 12.
LEACH, V.-C.
[364]

WIGSELL v. WIGSELL.

(2 Sim. & St. 364—370 ; S. C. 4 L. J. Ch. 84.)

A tenant in tail in remainder (after estates to A. for life, and to his first and other sons in tail) pays off a mortgage during the life of the tenant for life, takes an assignment to himself of the mortgage term, and afterwards comes into possession of the estate, and dies without issue : the mortgage is a subsisting charge for the benefit of his personal estate, there being no act to shew a contrary intention.

In the year, 1778, Thomas Wigsell, being seised in fee-simple of certain real estates, mortgaged them for a term of 2,000 years, to secure 1,000*l.* and interest.

By his will, dated in 1774, he devised his real estates to trustees, for a term of 500 years, upon trust to raise money for payment of his debts and of a sum of 1,500*l.* to Susannah Wigsell, on her marriage ; and, subject thereto, he devised the estates to Atwood Wigsell for his life, with remainder to the first and other sons of Atwood Wigsell in tail ; with remainder to Thomas Wigsell, the younger, for his life ; with remainder to his first and other sons in tail ; with remainder to Susannah Wigsell, and the heirs of her body ; with remainder to his own right heirs.

The testator died in 1778 ; and his will was proved by Atwood Wigsell, the sole executor, who entered into possession of the real estates, as tenant for life under the will.

Atwood Wigsell made his will in 1795, and died in the same year without issue. Thomas Wigsell, the younger, his brother,

† See 12 R. R. 274, 277.

and sole executor, proved his will, and entered into possession of the real estates, as tenant for life.

In 1797, Thomas Wigsell, the younger, being the heir-at-law of Thomas Wigsell, and, as such, seised of the reversion in fee of the real estates, expectant on the death of himself and Susannah Wigsell without issue, concurred with Susannah Wigsell in executing a settlement of the real estates on himself for life, with remainder to his first and other sons in tail, with remainder to Susannah Wigsell in tail, with remainder to trustees, for a term of 5,000 years, to raise 1,000*l.* and pay it to Susannah Wigsell, in discharge of the like sum due to her by Thomas Wigsell, the younger, on his bond, with remainder to the daughters of Thomas Wigsell, the younger, as tenants in common in tail, with remainder to Atwood Wigsell Wigsell for life, with remainder to the first and other sons of A. W. Wigsell in tail, with divers remainders over.

On the 3rd of July, 1805, during the lifetime of Thomas Wigsell, the younger, Susannah Wigsell paid off the 1,000*l.* due on the mortgage created by T. Wigsell, the elder, and, by an indenture of the same date, reciting that Thomas Wigsell, the younger, having been applied to by the mortgagees, but being unable to pay the 1,000*l.* Susannah Wigsell had paid it at his desire, the mortgage term of 2,000 years was assigned to Susannah Wigsell.

In September, 1805, Thomas Wigsell, the younger, died without issue. Upon his decease his widow, who was also his personal representative, entered into possession of a part of the estates comprised in the mortgage, which her husband had, in the year 1795, settled on her, for her jointure, under a power contained in the will of T. Wigsell, the elder, and Susannah Wigsell entered into possession of the rest of the estates as *tenant in tail, and continued in possession thereof till some time in 1806, when she died, without ever having been married. By her will, dated in November, 1805, she gave all her personal estate to her executors, for the benefit of Atwood Wigsell Wigsell.

Upon Susannah Wigsell's death, Atwood Wigsell Wigsell entered into possession of the estates, not comprised in the join-

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ture, as tenant for life under the settlement of 1797; and, in 1821, he died, having, by his will, bequeathed all his personal estate to the plaintiff, his widow.

The bill charged that the 1,000*l.* had never been called in by Susannah Wigsell, and prayed that it might be declared to be a subsisting charge upon the estates, and that the plaintiff was entitled to it as part of Susannah Wigsell's personal estate, which was bequeathed to her husband.

The widow of Thomas Wigsell, the younger, who was one of the defendants, by her answer, insisted that the term of 2,000 years, assigned to Susannah Wigsell, had merged in the inheritance, which had become vested in her in possession; and that Susannah Wigsell had never, after the death of Thomas Wigsell, the younger, made any claim upon the defendant, in respect of the interest of the 1,000*l.*, which had been charged upon part of her jointure lands, although a full settlement of all accounts between them had been made; nor did her executors ever make any such claim until a short time before the bill was filed; and that Susannah Wigsell was not only tenant in tail, but, under the settlement of 1797, had an absolute *power over the whole fee-simple, by means of a power of revocation and new appointment, which she had, in fact, exercised, by altering certain of the limitations in that settlement, on failure of the issue of Atwood Wigsell Wigsell.

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The cause now came on to be heard.

Mr. Roupell and *Mr. R. Roupell*, for the plaintiff:

There could be no merger in this case, on account of the term of 500 years, which intervened between the mortgage term and the limitation of the inheritance to Susannah Wigsell. In cases of this kind the Court always looks to the intention. *Forbes v. Moffatt* † establishes the rule, not only that the intention of the party must govern, but that the advantage of the personal representative is to weigh with the Court. *Thomas v. Kemish* ‡ is to the same effect.

† 11 R. B. 222 (18 Ves. 384).

‡ 2 Vern. 348.

Mr. Sugden and Mr. Pemberton, for the widow of Thomas Wigsell, the younger :

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In order to judge of the intention in this case, the Court must consider the situation of the parties. If it makes no difference whether the estate or the charge first vests, it is difficult to see how it can be made out that this charge subsisted after the inheritance became vested in Susannah Wigsell. The situation in which she stood at the time when the term was assigned to her, was such as made it clearly for her interest to keep the charge alive during the lifetime of Thomas Wigsell, the younger, who was then tenant for *life of the estates. If she had not done so, she would have lost the interest of the 1,000*l.* during the subsistence of his life estate. But, from the moment when the inheritance became vested in her, it became a matter of indifference whether the term was kept alive or not. She had concurred with Thomas Wigsell, the younger, in making a settlement of the estate on Atwood Wigsell Wigsell ; and that settlement was made, reserving a power of revocation to Susannah Wigsell. Was it then a probable intention on her part that the personal representative should diminish the estate by raising the amount of this charge out of it? In *Thomas v. Kemish* the tenant in tail died an infant, in which case the rule of the Court always is, to consider that the infant intended to keep the charge alive.

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Mr. Roupell, in reply :

Susannah Wigsell, though she was tenant in tail, never suffered any recovery ; and, not having done so, it is clear that she did not intend to make the estate her own. There is as much evidence of intention in this case, as in those in which the Court has held that the charge was not in equity extinguished. *Duke of Chandos v. Talbot*,† *Wyndham v. Lord Egremont*.‡

Mr. Longley and Mr. Daniell, for other defendants.

THE VICE-CHANCELLOR :

This bill is filed for the purpose of having it declared that the

† 2 P. Wms. 601.

‡ Amb. 753.

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plaintiff, as representing A. W. Wigsell, deceased, is entitled to have a sum of 1,000*l.* and *interest raised by sale or mortgage of the estate in question in this cause.

Susannah Wigsell, being tenant in tail in remainder of this estate, expectant upon the death of her brother, Thomas Wigsell, and failure of his issue, during the life of Thomas Wigsell, paid off an old mortgage of 1,000*l.* due upon this estate, and took an assignment of the mortgage term to herself. Thomas Wigsell afterwards died without issue, and Susannah became tenant in tail in possession, and afterwards died without issue, and without having suffered a recovery ; and the question is, whether the mortgage of 1,000*l.*, which she so paid off, did not, at her death, constitute part of her personal estate.

Where a tenant in tail in possession pays off a mortgage, and declares no intention that the charge shall continue for the benefit of the personal estate, there the charge ceases ; because the estate is considered as his own ; inasmuch as he may make it his own by suffering a recovery. This principle has no application to a tenant in tail in remainder whose estate may be altogether defeated by the birth of issue of another person ; and it must be inferred that such a tenant in tail means to keep the charge alive.

When Susannah Wigsell, therefore, became tenant in tail in possession, this charge subsisted as a part of her personal estate ; and, not having afterwards declared any intention to the contrary, I am of opinion that it continued part of her personal estate at her death, and that the plaintiff is entitled to the relief which she prays.

[370] This case has been partly argued on the ground of merger ; but merger is out of the question here, because of the intermediate estate.†

† See *Drinkwater v. Combe*, ante, p. 210.

TANIERE v. PEARKES.

(2 Sim. & St. 383; S. C. 4 L. J. Ch. 81.)

1825.

July 30.

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Legacy of 600*l.* to F., and at her death to her two daughters in equal shares, and at their death to their children. One of the daughters having died without children: Held, that the children of the other daughter did not take the whole 600*l.*, but only their mother's share.

THE question in this case was as to the construction of the following clause in a French will:

“Je donne ce legs à ma sœur Françoise, épouse de Monsieur Tanier de Feu, habitant à Camarade, Département de Larridge, † la somme de six cents livres sterlings, une fois payée à son décès à ses deux filles, qui leur sera partagée par deux égales portions: leur époux ne pourront en jouir qu'autant que son épouse consentira; à leur décès à leurs enfans.”

One of the daughters of the testatrix's sister Françoise died without children, and the question was, whether the children of the other daughter took the whole 600*l.* between them.

Mr. Treslove, for the children, cited *Malcolm v. Martin*, † *Doe v. Abey*.§

THE VICE-CHANCELLOR:

The case of *Malcolm v. Martin* has no application here. There the grandchildren took nothing till all the children were dead. Here the children of each daughter must plainly take their mother's share upon her death; and there are no words which can carry one daughter's share either to the surviving daughter or her children.

† *Sic*, but there is obviously some mistake. There is a department of the name of *Ariège* on the Pyrenean frontier.—F. P.
 † 3 Br. C. C. 50.
 § 14 R. R. 487 (1 M. & S. 428).

1825.
July 12,
August 2.

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(2 Sim. & St. 384—392; S. C. 4 L. J. Ch. 77.)

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Where a testator gives a sum of stock to trustees, and shews a clear intention to dispose of the whole of the dividends for the benefit of charitable institutions, and does, in fact, specify some of them, and the yearly sums to be paid to them, but leaves blanks for the names of others and for the sums to be paid to them; the Court will refer it to the Master to approve of a scheme for the application of the remaining dividends.

THIS was a suit for the administration of the trusts of the will of Augustus Godfrey Pieschel.

By his will, dated the 26th of October, 1820, after giving several pecuniary legacies to a large amount, he bequeathed to the president, treasurer and governors of Christ's Hospital, the sum of 1,000*l.*, upon condition that they, and their successors for the time being, for ever should distribute and pay the various annual sums after directed by him to be paid to the various charitable and other establishments in England after specified; and, in order to provide a fund adequate to those purposes, he gave to the president, treasurer and governors of Christ's Hospital, 30,000*l.* stock, then bearing an interest of 4*l.* per cent. per ann. in the London Dock Company, commonly called London Dock Stock, upon trust, from time to time for ever thereafter, to receive and take the interest, dividends and annual proceeds of the said London Dock Stock, and pay and apply the same in manner and for the purposes thereafter mentioned, that is to say, to pay yearly and every year for ever thereafter, the sum of 100*l.*, part of the interest, dividends and annual proceeds, to the treasurer for the time being of the London Hospital, to be, from time to time, applied and disposed of for the benefit of the same hospital.

The will then contained similar bequests of the yearly sums after mentioned to the following charities :

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100*l.* yearly to the Asylum for the Deaf and Dumb; 100*l.* yearly to the School for the Indigent Blind; 100*l.* yearly to the Middlesex Hospital; 50*l.* yearly to the Hospital for Lying-in Women; 50*l.* yearly to the Society for Relief of Prisoners for Small Debts; 50*l.* yearly to the Society for the Relief of

Foreigners in Distress; 50*l.* yearly to the City Orphan School; 100*l.* yearly to the London Orphan School; 50*l.* yearly to the St. George's, Hanover Square, Charity School.

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The will then proceeded in these words: "And do and shall, yearly and every year for ever hereafter, pay the sum of , other part of the said interest, dividends and annual proceeds, to the treasurer for the time being of , to be by him, from time to time, applied and disposed of for the sole use and benefit of that charity; and do and shall, yearly and every year for ever hereafter, pay the sum of , other part of the said interest, dividends and annual proceeds, to the treasurer for the time being of , to be by him, from time to time, applied and disposed of for the sole use and benefit of that charity; and do and shall, yearly and every year for ever hereafter, pay the sum of , other part of the said interest, dividends and annual proceeds, to the treasurer for the time being of , to be by him, from time to time, applied and disposed of for the sole use and benefit of that charity; and do and shall yearly, and every year for ever hereafter, pay the sum of , other part of the said interest, dividends and annual proceeds, to the treasurer for the time being of , to be by him, from time to time, applied and disposed of for the sole use and benefit of that charity; and do and shall, yearly and every year for ever hereafter, pay the sum of *200*l.*, being the residue of the said interest, dividends and annual proceeds, to the Earl of Chichester, or to the person or persons who shall or may, for the time being, be Earl of Chichester." The testator then directed the Earl of Chichester, for the time being, to apply 100*l.* yearly, part of such yearly sum of 200*l.*, for the poor inhabitants of Brighton, and the remaining 100*l.* for the sole benefit of the Brighton Infirmary, and then expressed himself as follows: "And I do hereby direct that the several yearly sums of 100*l.*, 100*l.*, 100*l.*, 100*l.*, 50*l.*, 50*l.*, 50*l.*, 50*l.*, 100*l.*, 50*l.*, so hereinbefore directed to be paid, applied and disposed of for the benefit of the said several charities, respectively, as aforesaid, shall, respectively, be annually paid to the respective treasurers for the time being of such charities, respectively, at the respective usual anniversary dinners of the same charities respectively, and at which anniversary dinners respec-

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tively, or some of them, William Frederick Duke of Gloucester and Edinburgh has usually presided. But in case, in any year or years, there shall be no anniversary dinner or dinners of all or any one or more of the said several charities respectively, then and in such case the annual sum or sums hereinbefore directed to be paid, applied and disposed of for the benefit of such of the said charities, whereof there shall be no such anniversary dinner or dinners respectively, shall be paid to the treasurer or respective treasurers thereof, respectively, at the period or time of the year, or respective periods or times of the year, when the general annual collection or collections for the same charity or charities respectively, shall take place ; the first annual payment of such annual sums of 100*l.*, 100*l.*, 100*l.*, 100*l.*, 50*l.*, 50*l.*, 50*l.*, 50*l.*, 100*l.*, 50*l.*, to begin to be made at the several and respective *anniversary dinners, or at the respective times of the several and respective general anniversary collections, as the case may be, which shall first and next happen after my decease respectively. And I hereby further declare my will to be, that, in case the dividends, interest and annual proceeds of the said London Dock Stock, hereinbefore given and bequeathed to the said president, treasurer and governors for the time being of Christ's Hospital aforesaid, upon the trusts aforesaid, shall, at any time or times, be more than sufficient to pay the said several sums of 100*l.*, 100*l.*, 100*l.*, 100*l.*, 50*l.*, 50*l.*, 50*l.*, 50*l.*, 100*l.*, 50*l.*, amounting together to the annual sum of 1,000*l.*, then, and in such case, the surplus of such interest, dividends and annual proceeds shall, from time to time, be divided into two equal moieties, and one moiety thereof shall be paid to or retained by the president, treasurer and governors for the time being of Christ's Hospital aforesaid, for the benefit of the same institution, nevertheless subject to such and the like conditions as are hereinbefore contained with respect to the said sum of 1,000*l.* hereinbefore bequeathed to the said president, treasurer and governors of Christ's Hospital aforesaid, and the other moiety of such surplus shall be paid to the treasurer for the time being of Hetherington's Charity for the Blind, under the management of Christ's Hospital aforesaid."

After some other bequests, the testator gave the residue of his

estate and effects unto his nephews and nieces living and born at his decease, share and share alike, as tenants in common, for their own absolute use and benefit.

PRESCHEL
C.
PARIS.

The testator, by a codicil, dated in April, 1821, after *reciting the bequest of 30,000*l.* stock of the London Dock Company, and that doubts might be entertained whether he could, consistently with the provisions of the mortmain laws, legally and effectually bequeath London Dock stock upon the trusts in his will expressed concerning such stock, revoked the gift and bequests, in his will made, to the president, treasurer and governors of Christ's Hospital aforesaid, of the said 30,000*l.* London Dock stock, and, in lieu thereof, gave to them 40,000*l.* Three per cent. Consolidated Bank Annuities, upon the same trusts, and for the same purposes as were in his will expressed concerning the London Dock stock.

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The bill was filed by some of the residuary legatees, who insisted that, with regard to the 40,000*l.* Three per cent. stock bequeathed by the will and codicil to the president, treasurer and governors of Christ's Hospital, such bequest was only good in respect of such charities as were specifically named and pointed out by the testator as the objects of his bounty; and that, in regard to all such other parts of the 40,000*l.* Three per cent. Stock, in respect of which blanks were left by the testator in his said will for the names of the other charities which were to be entitled, or the sums to which they were to be entitled, the same were void for uncertainty; and that so much of the said 40,000*l.* Three per cent. stock as was not well bequeathed by the will, fell into and constituted a part of the general residuary personal estate of the testator.

The governors of Christ's Hospital, by their answer, claimed an interest in so much of the 40,000*l.* Three per cent. stock, and the interest or dividends thereof, as was not specifically bequeathed by the will, and in respect *of which blanks were left in the will; and insisted that, as such governors, they were alone entitled to apply and distribute such parts of the 40,000*l.* Three per cent. stock, or of the interest and dividends thereof, in respect of which such blanks were left, either for the benefit of Christ's Hospital, or to such other charitable purposes as they might

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PIESCHEL think proper, and that the same did not pass to, and form a part
v. of, the general personal estate of the testator.
PARIS.

Mr. Heald and Mr. Phillimore, for the plaintiffs :

This cannot be held to be a gift for charitable purposes, generally ; because not only the mode of application is left uncertain, but the very sum which is to be the substance of the gift is undefined : *Mills v. Farmer*.† The Court has certainly held that, where a testator gives a legacy to a charity, to be named in a codicil to his will, although no codicil is made, it is a good gift for general charitable purposes, to be effectuated under the direction of the Court. But, in all these cases, the precise amount of the gift is specified by the testator. Where the amount is not specified, as in this case, there is so much uncertainty that the Court cannot act.

Mr. Turner, for some of the residuary legatees, who were defendants :

The cases have certainly gone a great length in effectuating a general intention to give for a charitable purpose. But if the Court can collect that it was not the intention to dispose of the legacy at all, unless for some particular charity, there is great difficulty in holding that there is any gift at all for any charitable purpose.

[390] *Mr. Daniell*, for the governors of Christ's Hospital :

It is plain, as the blanks were not filled up, and as there is a general gift to a charity, that the testator meant, if he did not fill up the blanks, that the whole should go to Christ's Hospital. In *Moggridge v. Thackwell*,‡ the LORD CHANCELLOR laid down the principle that, where there is a general indefinite purpose, not fixing itself upon any object, as this in a degree does, the disposition is in the King by sign manual : but where the execution is to be by a trustee, with general or some objects pointed out, there the Court will take the administration of the trust. On the authority of that case, the execution of the charitable

† 13 R. R. 247 (1 Mer. 55).

‡ 6 R. R. 76 (7 Ves. 36).

trust is here, by the will, vested in the governors of Christ's Hospital, who would be entitled to lay before this Court a scheme for the administration of the charity. *Baylis v. The Attorney-General*,† and *Wheeler v. Sheer*,‡ are to the same effect.

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Mr. Wray, for the Attorney-General:

This is a stronger case than *Mills v. Farmer*; for, in that case, and in a case in 2 Freeman, 262, Ca. 330 b. there cited, the Court proceeded upon a mere general indication to give to a charity. In that case the disposition of the fund was left to the Crown, and the same course should be pursued here.

THE VICE-CHANCELLOR:

The testator gives to the president, treasurer, and governors of Christ's Hospital, a legacy of 1,000*l.*, upon condition that they, and their successors for ever, *do distribute and pay the various annual sums next in his will directed to be paid, to the various charitable and other establishments thereafter mentioned; and, for that purpose, he gives, to the president, treasurer, and governors of the Hospital, 30,000*l.* stock, bearing an interest of four per cent., in the London Dock Company, commonly called London Dock shares, upon the trusts after mentioned, that is to say, upon trust that they, the president, treasurer, and governors for the time being, should, from time to time for ever thereafter, receive the dividends, interest and annual proceeds of the Dock shares, and should apply the same in the manner and for the purposes thereafter mentioned: he then directs that, of such interest and dividends, they shall every year pay the sum of 100*l.* to the treasurer of the London Hospital, for the sole use and benefit of that charity; and, in like manner, he directs that, of such interest and dividends, they shall every year pay certain other sums, amounting together to 650*l.*, to nine other charitable institutions, for the use and benefit of those charities; he then directs that they shall, every year, pay the sum of , other part of the said interest and dividends, to the treasurer of , to be by him applied for

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† 2 Atk. 239.

‡ Mos. 288.

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the benefit of that charity; and these blank gifts are four times repeated in the same form of expression. He then directs that they do and shall, every year, pay the sum of 200*l.*, being the residue of the said interest and dividends, to the Earl of Chichester for the time being, to be by him applied to certain other charitable purposes there specified. This last disposition makes it evident that the four blank gifts were intended to amount together to the sum of 250*l.*, which, being added to the sum of 750*l.* before given, and the 200*l.* after given to the Earl of Chichester, would complete the *full sum of 1,200*l.*, being the amount of the annual interest or dividends on the 30,000*l.* stock in the London Dock Company.

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The effect of this will is, that it manifests a general disposition of the testator to dispose of the sum of 1,200*l.* in charities; but that the testator had not absolutely made up his mind as to the particular charities which should share in the 250*l.*

I am of opinion, upon the authority of the case of *Mills v. Farmer*, and the cases there referred to, that this Court will execute that general intention; and that it must, in that case, be referred to the Master to approve of a scheme for the application of this 250*l.*, having regard to the nature and character of the other gifts contained in the will.

1825.
June 29.
August 17.

LEACH, V.-C.
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WINTER v. BLADES.†

(2 Sim. & St. 393—396; S. C. 4 L. J. Ch. 81.)

Where the purchaser, upon entering into possession, paid the amount of his purchase-money to his banker, and gave notice that he was ready to invest it in such manner as the vendor should require; but no answer was returned to that notice, and the purchaser, during the investigation of the title, kept in the hands of his banker a balance equal to the amount of the purchase-money, except for four days, when it was a little less: the Court held the purchaser not liable for interest on the difference between his average balance during the period in question and during the three preceding years.

THE bill in this cause was filed, by the vendor of an estate, merely for the purpose of claiming interest on the purchase-

† *Kershaw v. Kershaw* (1869) L. R. 9 Eq. 56.

money from the time the defendant, the purchaser, was let into possession. The purchase-money was 14,000*l.* and, immediately upon entering into the contract, the purchaser called in a sum of money, secured by a mortgage, amounting to 12,400*l.*; and, upon entering into possession of the estate, gave notice to the vendor that he was ready to invest the purchase-money as he should direct, pending the investigation of the title. The vendor, hoping for an immediate conclusion of the purchase, did not answer that notice. The investigation of the title, however, occupied nine months.

The banker of the defendant proved that, during the nine months, the balance of the defendant in his hands was never less than 14,000*l.*, except during three successive days, when it was 13,876*l.*, and one other day, when it was 13,796*l.*

Mr. Horne and Mr. Pemberton, for the plaintiff:

The Court has held the purchaser liable to pay interest in cases much stronger than the present. *Powell v. Martyr*.†

* * Here there was no appropriation. The money was merely paid by the defendant into the hands of his banker, where he must have had a balance, at any rate. * * It is settled there must be distinct notice that the money is unproductive. * * *

Mr. Hart and Mr. Pepys, for the defendant, insisted on the facts that the money had been unproductive; that the delay had been occasioned entirely by the plaintiff, although the defendant did all in his power to urge him on to a completion of the contract; and that the defendant had called in a mortgage, for the sole purpose of obtaining the money to pay for his purchase; and that, at the very time when the plaintiff sent notice that he expected interest at five per cent., he had not shewn a good title to the estate.

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The VICE-CHANCELLOR recommended the parties to come to a compromise; but, as they declined doing so, the case stood for judgment.

† 7 R. R. 7 (8 Ves. 146).

WINTER
v.
BLADES.

THE VICE-CHANCELLOR :

If, after the notice given by the defendant, he had made no profit of the purchase-money, then it would not be reasonable that he should be charged with interest. But that he has made some profit of the money appears upon the defendant's own evidence ; first, because his balance at his banker's was, in a small degree, and for a few days, reduced below the amount of the purchase-money ; but, principally, because the purchase-money supplied the place of that balance, which he must otherwise have maintained at his banker's.

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Let the Master inquire what was the average balance which the defendant maintained at his banker's during the three years preceding the purchase, computing such balances at the end of every month ; and let the *Master also inquire what was the average balance which, during the time in question, the defendant maintained at his banker's, computing such balance monthly ; and let the Master deduct what he shall find to have been the defendant's average balance for the three years, from what he shall find to have been the defendant's average balance during the time in question ; and declare that, to the amount of that difference, the defendant is not chargeable with interest on his purchase-money.

1825.

July 12.
August 17.

LEACH, V.-C.
[400]

BIRD v. WOOD.

(2 Sim. & St. 400—402.)

Bequest to the testatrix's daughter for life, and after her death as she should appoint, and, in default of appointment, *to the testatrix's next-of-kin, to be considered as a vested interest from the testatrix's death, except as to any child afterwards born of her daughter.* The daughter having died without having had any child, and without executing any appointment : Held, that the persons who would be next-of-kin at the testatrix's death, if her daughter had been then dead without children, were entitled.

ELIZABETH LOSH bequeathed to trustees all her interest and shares in the funds and capital stock transferable at the Bank of England, or which might be standing in her name at her death, or she might be entitled unto as the widow and one of the next-of-

kin of her late husband, upon trust to pay the interest and dividends thereof into the proper hands of her daughter Mary, the wife of the defendant Thompson, during her natural life; and, after the death of her daughter, to transfer the stock, and pay the interest and dividends thereof unto such persons or person, and in such shares and proportions, as her daughter, whether sole or coverte, should, by deed or will executed as therein mentioned, give or devise the same; and, for want of such gift or devise, then upon trust to assign and transfer the stock, and pay the unpaid dividends thereof, unto her own next-of-kin, according to the Statute of Distributions, to be considered as a vested interest from the time of the testatrix's death, except only as to any child that might be afterwards born of her daughter.

BIRD
v.
WOOD.

The testatrix's daughter died intestate, without ever having had a child, and without having executed *the power of appointment. Her husband survived her, took out letters of administration of her estate and effects, and now claimed to be entitled to the fund bequeathed.

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The bill was filed against him by certain persons who would have been the next-of-kin of the testatrix at the time of her death, if her daughter had then been dead without issue; and the question was, whether they or the husband were entitled to the fund.

Mr. Horne and Mr. Matthews, for the plaintiffs :

It is clear that the testatrix did not mean to die intestate as to anything. The will authorises the exclusion of the daughter, because, without excluding her, it is impossible to make sense of it.

Mr. Boteler, for defendants in the same interest with the plaintiff, cited *Jones v. Colbeck*,† where the Court, on a direction that, upon the decease of the testator's daughter without issue, the estate should go in a due course of administration, held that those who were next-of-kin at the death of the daughter were entitled.

† 6 R. B. 207 (8 Ves. 38).

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v.
WOOD. *Mr. Phillimore*, for the daughter's husband, cited *Holloway*
v. *Holloway* † and *Doe* v. *Lawson*. ‡

Mr. Abercrombie, for other defendants, said that the clear meaning of the words was, that the persons who were next-of-kin at her death should take; and that their interest should become vested upon her death.

[402] *Mr. Wray*, for other defendants.

THE VICE-CHANCELLOR :

The persons who, at the testatrix's death, would have been her next-of-kin if her daughter had been then dead without children, are plainly intended here. The daughter could not be such next-of-kin; for the persons intended were to take at her death: and the persons intended must have been living at the death of the testatrix; for their interests were then to be vested.

[*Note*.—The VICE-CHANCELLOR here referred to that provision of the will which expressly declared that those interests were to vest at the time of the testatrix's death. See *Elmsley* v. *Young*, 2 Mylne & Keen, at p. 89.—O. A. S.]

· † 5 R. R. 81 (5 Ves. 399).

‡ 7 R. R. 454 (3 East, 278).

REEVE v. HICKS.†

(2 Sim. & St. 403—408; S. C. 4 L. J. Ch. 85.)

1825.
July 4.
August 17.

LEACH, V.-C.

[403]

Husband and wife mortgaged the wife's freeholds for 1,000 years, reserving the power to redeem to them, or either of them, and covenanted to levy a fine to the mortgagee for the term, and, subject thereto, to the husband in fee: they also surrendered the wife's copyholds to the mortgagee in fee, reserving the power to redeem to the husband and his heirs; the husband afterwards released his equity of redemption, as to both estates, to the mortgagee in fee: the mortgagee entered into possession, and the husband afterwards died: Held, that the wife was entitled to redeem the copyholds, but not the freeholds.

THIS was a bill for the redemption of a mortgage of freehold and copyhold estates.

In March, 1760, Anne Reeve, being seised in fee of certain copyhold estates, joined with Bendall Reeve, her husband, in making a voluntary surrender of them to the use of herself for life, remainder to Bendall Reeve for life, remainder to the children or grandchildren of Anne Reeve, living at her death, in such shares as she should appoint; and, in default of appointment, to her children, as tenants in common in fee: but, if she should die in the lifetime of Bendall Reeve, and leave no child or grandchild living at her decease, or they should all die in the lifetime of Bendall Reeve, under the age of twenty-one, and without issue, then to the use of Bendall Reeve in fee.

Bendall Reeve, being seised in fee, in right of his wife, of certain freehold estates, by indenture, dated the 10th of February, 1770, joined with his wife in demising them for a term of 1,000 years, by way of mortgage, to John Burrell, to secure the repayment of a sum of money lent to him by Burrell. This deed contained a reservation of a peppercorn rent, during the term, to Bendall Reeve and Anne his wife, and to the heirs and assigns of Anne; and also a covenant, on the part of Reeve,

† Although the VICE-CHANCELLOR in his judgment (*post*, p. 244) held that this case was not distinguishable in principle from *Jackson v. Innes*, 20 R. B. 45, yet the intention that the fine should go beyond the purposes of the mortgage is certainly

far less obvious in the present case than it was in *Jackson v. Innes*, and that circumstance, coupled with the fact that the redemption of the copyholds raised a different question, makes it expedient to retain this case in the Revised Reports.—O. A. S.

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[*404]

for himself and his *wife, that they would, as of the next term, at his costs and charges, levy a fine *sur conuzance de droit come ceo*, &c., with proclamations, of the estates thereby demised, to the use of Burrell for the term thereby demised, for better securing the mortgage-money, and subject thereto, to the only use and behoof of Reeve, his heirs and assigns, for ever, and for no other use, intent or purpose whatsoever. The clause for redemption provided that, upon repayment of the mortgage-money and interest, by Bendall Reeve and Anne his wife, or either of them, their or either of their heirs, executors, administrators or assigns, upon the 10th of February, 1771, the term of 1,000 years should cease.

A fine was duly levied by Reeve and his wife, pursuant to the covenant.

By an indenture, dated the 27th of December, 1775, after reciting that one Hicks had paid off the mortgage-money due to Burrell, Reeve and Burrell assigned the remainder of the 1,000 years' term to Hicks, with a proviso that, upon repayment of the mortgage-money by Reeve, his heirs, executors or administrators, on the 27th of June, 1775, the term should cease; and Reeve covenanted that, for better securing the mortgage-money, he and his wife would surrender the copyhold estates to Hicks in fee, subject to the same proviso for redemption as was reserved as to the freeholds.

On the 3rd of January, 1776, Reeve and his wife surrendered the copyhold estates to Hicks in fee, pursuant to the last-mentioned covenant.

[*405] By indentures of lease and release, dated the 20th and 21st of August, 1779, made between Reeve of the *one part, and Hicks of the other part, after reciting that no part of the principal money or interest secured by the mortgage to Hicks had been paid, but that a larger sum was due in respect of it than the mortgaged estates were really worth, Reeve released to Hicks, his executors, administrators and assigns, all his equity of redemption in the freehold and copyhold estates.

After this release, Hicks entered into possession both of the freehold and copyhold estates, and was admitted to the copyholds, which he surrendered to the use of his will; and died in

1801, having devised his freehold and copyhold estates to the defendant.

REEVE
F.
HICKS.

Reeve died intestate, in 1809, leaving his wife surviving him.

The original bill was filed in 1820, by her and her two children, for a redemption of the freehold and copyhold estates.

Mr. Treslove, for the plaintiffs :

If there be nothing more than a mere mortgage of the wife's estate, it is settled that a husband cannot deprive her of the equity of redemption by reserving it to himself and his heirs alone. *Corbett v. Barker* † applies to this case, and is of higher authority, because the Court did not adhere to the opinion which it first pronounced. In the report of that case, however, there is a mistake in saying that the equity of redemption was reserved by fine. * * *

Mr. Sugden and *Mr. Kindersley*, for the defendant [cited [406] *Jackson v. Innes*]. ‡ There is no case in the books in which, there being a distinct limitation to the husband, and nothing indicating a different intention on the face of the deed, that limitation has been held to be nugatory. Supposing the wife had intended to limit the estate to her husband, as appears on the face of this deed, it would make no difference who was to pay the mortgage-money. * * *Corbett v. Barker* was a case quite different from the present, because there was in it a gross and manifest inconsistency on the face of the deed, which contained no limitation at all to the husband, but only a reservation to him of the equity of redemption. * * *

Mr. Treslove, in reply :

[407]

The deed of 1770 contains a *reddendum* to Bendall Reeve and Anne his wife, and to the heirs of Anne. That is clear evidence of an intention to reserve the equity of redemption to her, as the rent is incident to the reversion. * * *

† 4 R. R. 856 (1 Ans. 138, and 3 ‡ 20 R. R. 45 (1 Bligh, 104).
Ana. 755).

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[408]

THE VICE-CHANCELLOR :

This case is not distinguishable in principle from *Innes v. Jackson*. The limitation of the uses of the fine to the husband and his heirs has no connection with the purpose of mortgage, or the proviso of redemption, but is altogether a new settlement which defeats the heir of the wife.

Declare the freeholds to be irredeemable, and the copyholds to be redeemable by the plaintiff; and refer it to the Master to apportion the mortgage-money between the freeholds and copyholds; the plaintiff to be at liberty to redeem the copyholds, on payment of what the Master shall apportion as to the copyholds, with interest, with an account of the rents and profits from the death of B. Reeve.

1825.
Nov. 24.

LEACH, V.-C.
[441]

THE ATTORNEY-GENERAL v. PEMBROKE HALL.

(2 Sim. & St. 441—448; S. C. 4 L. J. Ch. 58.)

A corporation, which was bound to pay out of the revenues of charity lands a certain annual sum to a college, in the year 1607 conveyed to the college lands then of that annual value, in satisfaction of the annual sum.

The lands so conveyed by accidental circumstances became of much greater value in proportion than the lands which were reserved by the corporation for the other purposes of the charity; yet the Court will not, at this day, undo an arrangement which was fair at the time, and had the approbation of the executor of the founder.

1829.
Nov. 9, 12.
1830.
June 1.

[THIS decision was affirmed on appeal, as reported in 1 Russell & Mylne, 751.]

1825.
Dec. 10.

LEACH, V.-C.
[453]

COCKBURN v. RAPHAEL.

(2 Sim. & St. 453—454.)

The Court will appoint a receiver in India of a testator's assets on the application of an executor resident in England, but the receiver must give sureties resident in England.

AN executor, who had proved the will in India, having returned to England, proved it in the Prerogative Court of Canter-

bury also, and filed a bill in this Court for the administration of the assets, and for a receiver. His co-executor, who had resided in India and collected the effects there, being dead, he now moved for the appointment of a receiver in India.

COCKBURN
v.
RAPHAEL.

Mr. Kindersley, for the motion, said that he believed that the more usual course of the Court was, not to appoint a receiver abroad, but to appoint a receiver here, who appointed his own agent abroad.

Mr. Hart, *amicus curiæ*, stated that the LORD CHANCELLOR had, in several cases, appointed a receiver abroad, he giving security in this country.

THE VICE-CHANCELLOR :

Generally speaking, an executor who has proved the will, cannot retire from his duty, and apply to the Court for a receiver; but must collect the estate himself. But in this case, there being assets in India, the executor would be allowed the expense of an agent to collect them; and the appointment, therefore, is no additional charge to the estate: and it is reasonable *that the executor should be relieved from all responsibility with respect to his agent, by the Court taking the nomination upon itself.

[*454]

Let the Master approve of a proper person, to be nominated by the plaintiff, to be receiver of the assets in India; such receiver to give sureties resident in England.—Reg. Lib. A. 1825, fol. 409.

1825.
Dec. 16.

LEACH, V.-C.
[454]

DACRE v. GORGES.

(2 Sim. & St. 454—456; S. C. 4 L. J. Ch. 50.)

Surveyors appointed to make a partition between tenants in common, having, by mistake, allotted to one of them a piece of land which belonged to him exclusively, and several of the allotments having been sold before the mistake was discovered, the Court decreed a pecuniary compensation to be made to him.

THE plaintiff, defendant, and three other persons, were entitled, in equal shares, to certain estates as tenants in common in fee.

In 1809 they agreed to effect a partition; and, for that purpose, they appointed surveyors to value the estates and divide them into five distinct allotments. The whole estates were conveyed to a trustee, and, after the allotments were made, they were conveyed, in severalty, to each of the parties.

The surveyors, in making their valuation, erroneously included eleven acres of land in which the plaintiff alone was interested, and these eleven acres were included in the allotment made to the plaintiff; so that, to the extent of their value, the plaintiff had less of the estate to be divided than the four other tenants in common.

[*455] This mistake was not discovered till the year 1820; and was then communicated to the other tenants in *common, some of whom had sold considerable parts of their allotments; so that the mistake could not be remedied by a new partition. But all the other tenants in common, having made compensation to the plaintiff according to a new valuation, and the defendant alone refusing to do so, this bill was filed to compel a compensation in money according to the valuation, or to secure to the plaintiff a sufficient rentcharge for equality of partition.

The answer denied the mistake, and insisted that the plaintiff had no claim, against the defendant, in respect of the matters mentioned in the bill. The mistake, however, was clearly proved by the evidence in the cause.

Mr. Sugden, and Mr. Teed, for the plaintiff.

Mr. Rolfe, for the defendant :

DACRE
v.
GOREAU.

The plaintiff is to be considered as a purchaser of the allotment awarded by the surveyors : and is as much bound to see that he had a good title to the whole allotment, as a purchaser is bound to see to the title to the whole estate purchased by him. A purchaser has no remedy in case of eviction, unless upon the covenants of the vendor ; and, in this case, the plaintiff has no protection of that kind. The plaintiff might have entered.

Mr. Sugden, in reply :

It is impossible to show any analogy between this case and that of a purchaser. In *Bustard's* case,† *it was resolved that, upon an exchange, if one of the parties was evicted, he should have recompence under the warranty implied by the exchange ; and it is added, “ the same law in case of partition.” And in Co. Litt. 174 a, it is expressly said that, in case of eviction after partition, the party evicted shall have recompence. It was impossible for the plaintiff to enter, because the mode of partition was by conveying the whole of the estate to a trustee, who reconveyed to each party his allotment. This is a case of mistake, committed by joint agents, and therefore is clearly a case for equitable relief.

[*456]

THE VICE-CHANCELLOR :

This is a plain case of mistake on the part of the surveyors, against which it is the office of a court of equity to relieve. The common title under which all parties claim upon a partition, never comes into question ; and the case put, of a purchaser with a defective title, has no application here.

“ This Court doth declare that the plaintiffs are entitled, in right of the plaintiff *Meliora Dacre*, to a compensation from the defendant, in respect of the one-fifth part of the piece or parcel of land allotted to the plaintiffs, as in the pleadings mentioned ; and it is ordered that the defendant do pay to the plaintiff *Meliora Dacre*, for her own separate use, the sum of 196*l.* 19*s.*,

† 4 Co. 121.

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the value of such one-fifth part, with interest of four per cent. per annum from the 29th day of September, 1820, together with the plaintiff's costs of this suit."—Reg. Lib. A. 1825, fo. 939.

1826.
Jan. 26.

LEACH, V.-C.
[465]

BRISTOW v. BOOTHBY.

(2 Sim. & St. 465—470; S. C. 4 L. J. Ch. 88.)

Settlement on husband and wife for their lives, remainder to the sons in tail male, remainder to the daughters in tail, remainder to the survivor of the husband and wife in fee, with power to the wife, if the husband survived, and all the children of the marriage died without issue, to charge the estate with 5,000*l.*: Held, that the power is void for remoteness.

By Sir Brooke and Lady Boothby's marriage settlement, certain freehold estates, the property of the lady, were settled on Sir Brooke Boothby for life, with remainder to Lady Boothby for life, with remainder to trustees for 500 years, for raising portions for the younger children of the marriage, with remainder to the first and other sons of the marriage in tail male, with remainder to certain other trustees, for a term of 1,000 years, to raise portions for the daughters in default of issue male of the marriage, with remainder to the first and other sons of Lady Boothby, by any after-taken husband, in tail male, with remainder to the daughters of Lady Boothby, equally, as tenants in common in tail, with remainder to the survivor of Sir Brooke and Lady Boothby in fee: And it was provided that, in case there should not be any child or children of the marriage, or, there being such, all of them *should die without issue, and Sir Brooke should survive Lady Boothby, then it should be lawful for Lady Boothby, by deed or will, whether she should be covert or sole, and notwithstanding her coverture, to charge the premises with 5,000*l.*, to be raised and paid, after the decease of Sir Brooke and Lady Boothby, and such failure of issue as aforesaid, to such person as Lady Boothby should direct, and to create a term of years for the better raising of such sum of money.

[*466]

There was only one child of the marriage, who died at the age of eight years.

BRISTOW
v.
BOOTHBY.

Lady Boothby died in the lifetime of Sir Brooke, having, by her will, executed the power of charging the settled estates with the 5,000*l*.

The present suit was instituted, by a person claiming under that will, against the heir of Sir Brooke Boothby for the purpose of giving effect to that charge. The defendant put in a general demurrer.

Mr. Tinney, and *Mr. Coote*, in support of the demurrer :

Any estate or charge limited after an indefinite failure of issue, not inheritable under the limitations, is void for remoteness. *Lady Lanesborough v. Fox*.† * * There might have been a son who might have died under twenty-one, leaving a daughter ; in which case the power could not have been barred, nor would it [take effect] until a general failure of issue. It may be also said the power is good in the event. But if a power or estate is void for remoteness, it cannot be made good in the event : *Proctor v. The Bishop of Bath and Wells*.‡

[467]

Mr. Sugden, in support of the bill :

* * The word "issue," here, is not used in a technical sense ; not to create a limitation, but only to specify the event in which the power is to arise : any language may be used for that purpose. There is no rule that is applicable to the construction of a will, which may not be applied in construing a clause which is to give effect to a proviso. The intention of the parties must guide in both cases. If then it can be inferred that the parties to this settlement regarded sons of the marriage only, what is there to prevent the Court from holding that the settlors by the word "issue" meant issue inheritable under the settlement ? That word admits of modification, and the Court has power to modify it.

[469]

Mr. Sclater, with *Mr. Sugden*, relied on *Morse v. Lord Ormonde*.§

† Cas. t. Talb. 262.

‡ 3 B. R. 417 (2 H. Bl. 358).

§ 21 B. R. 284 (5 Madd. 99) : see the report on appeal, p. 85 above.

BRISTOW THE VICE-CHANCELLOR:

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BOOTHBY.

[*470]

In that part of the instrument which creates the power, the clear expressed intention is, that it shall only take effect upon a general failure of issue of the marriage; and there is no language, in any other part of the instrument, which can authorize a Court to state that this was not the real intention of the parties. There can be no doubt that, if it had been pointed out to the parties that the estate was not limited to all the issue of the marriage, and that the power expressed was, therefore, too remote, the deed would have been altered, *and that the power and the limitations to the issue would have been made to correspond. But there is nothing in this instrument which enables me to say whether this would have been effected by extending the limitation to the sons in tail general, or by directing that the power should arise upon the failure of the particular issue of the marriage, who were inheritable under the settlement, as it is now framed. I am compelled, therefore, to construe the deed as I find it, and to say that the event upon which the power is to arise, being too remote, the

Demurrer must be allowed.

1826.

Feb. 1.

LEACH, V.-C.

[472]

JACKSON AND WIFE v. ROWE.†

(2 Sim. & St. 472—475; S. C. 4 L. J. Ch. 119.)

A plea of purchase for valuable consideration, without notice, is no protection against an adverse claim which the purchaser might have had notice of, by using due diligence in investigating the title.

THE bill stated indentures of lease and release, dated in September, 1789, by which the late father and mother of the plaintiff, Mrs. Jackson, limited an estate to the use of the father for life, remainder to the mother for life, remainder to one or more of their children as they, jointly, or as the survivor of them, should appoint: That by an indenture, dated in July, 1799, reciting the indentures of September, 1789, and that the

† *Maxfield v. Burton* (1873) L. R. 17 Eq. 15, 43 L. J. Ch. 46.

father was dead without having joined with the mother in exercising the power, the mother, in exercise of the power given to her by the indenture of release, appointed the estate to the use of the plaintiff, Mrs. Jackson, in fee: that, at the time of the execution of the appointment, Mrs. Jackson lived with her mother, and continued so to do until the year 1801, when her mother intermarried with the late father of the defendant: that, during all such residence, her mother kept in her possession the title deeds of the estate, and received the rents of it on her, the plaintiff's, account, and, from time to time, duly accounted with her for the same: that the defendant's father, upon his marriage with Mrs. Jackson's mother, *took possession of the title deeds, and received, and applied to his own use, the rents of the estate: that he died in October, 1816, leaving his wife him surviving, and the defendant his executor and heir-at-law: that the plaintiff's mother died in March, 1824, having appointed the plaintiff sole executrix of her will: that the defendant, either as heir or devisee of his father, had taken possession of the title deeds, and entered upon the estate, and received the rents of it, from the death of his father, and still was in the receipt thereof. The bill prayed that the defendant might account for, and pay to the plaintiff the amount of the rents received both by his father and himself; and might deliver up to the plaintiffs the title deeds; and be restrained from further receiving the rents.

The defendant demurred, for want of equity, to so much of the bill as sought either relief or discovery with respect to the rents received, either by himself or his father, in the lifetime of Mrs. Jackson's mother. And, as to the relief and discovery founded upon Mrs. Jackson's title to the estate under the indentures of 1789, and the subsequent deed of appointment, the defendant pleaded that he had been informed and believed that Mrs. Jackson's mother, before her second marriage, and the execution of the indentures after mentioned, pretended that she was seised in fee, in possession, of the estate, and was in quiet possession or receipt of the rents and profits thereof: that, in November, 1801, a marriage was agreed upon between Mrs. Jackson's mother and the defendant's late father; and that, in consideration thereof, the former agreed to convey to the latter the fee-simple of the

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ROWE.
[*474]

estates, in possession, in manner after mentioned: that, by indentures of lease *and release, dated the 18th and 19th of November, 1801, after reciting that Mrs. Jackson's mother was seised in fee of the estate, the intended marriage, and the agreement previous thereto, the mother conveyed the estate to the defendant's father and his trustee, in the usual manner to bar dower. The plea then denied notice, in the defendant's father, of any right or title of the plaintiff Mrs. Jackson to the estate, or of the indentures of 1789, and stated the defendant's title to the estate under his father's will, and insisted that the father was a *bonâ fide* purchaser of the estate, for valuable consideration, without notice.

The plea was supported by an answer to the same effect as the averments denying notice.

Mr. Hart, and *Mr. Walker*, in support of the demurrer, argued that, by the true effect of the indenture of appointment, as stated in the bill, the plaintiff, Mrs. Jackson, took no interest in the rents and profits during the life of her mother, and, consequently, could not be entitled to any account of such rents and profits during that period.

THE VICE-CHANCELLOR was of that opinion.

In support of the plea, they insisted that marriage, being a valuable consideration, the plea was a sufficient plea of purchase for a valuable consideration without notice; and they cited *Wallwyn v. Lee*.†

Mr. Heald, and *Mr. Tennant*, in support of the bill.

[475] THE VICE-CHANCELLOR :

I agree that the consideration of marriage will support a plea of purchase for valuable consideration, equally with a price paid in money. But the question here is, whether the defendant's father was not, at the time of the marriage, affected with implied

† 7 R. R. 142 (9 Ves. 24).

notice of the settlement of 1789. It must be intended, upon these pleadings, that the title of the plaintiff's mother to the estate in question depended wholly upon this settlement; and the defendant's father, like every other purchaser, was bound to use due diligence in the investigation of the title before he accepted the conveyance of the estate. With due diligence he must have discovered the root of the title; and that his intended wife had only a life estate; and although he may, in fact, have been ignorant of the settlement, according to the averment of the plea, yet, in equity, he must be fixed with all the knowledge which it was reasonable he should acquire: and the plea is therefore disproved by the implied notice. If it were otherwise, a mere disseisor would have a marketable title.

If the plea, instead of resting upon the mere assertion of the intended wife that she had a good title, had pleaded some instrument, anterior to the settlement of 1789, by which the fee-simple had vested in her, and had averred that the defendant's father relied upon such prior title, and had no notice of the settlement, then the defence would have prevailed, because reasonable diligence on the part of the defendant's father could not necessarily have led to the discovery of the suppressed settlement.

The plea must be overruled.

KNIGHT v. KNIGHT.

(2 Sim. & St. 490—493.)

Legacy to A. as soon as she attains twenty-one, with interest, is contingent, and no interest is payable until the legatee attains twenty-one, and then is to be computed from the end of a year after the testator's death.

EDWARD KNIGHT, by his will, dated the 26th of July, 1803, gave to trustees 50,000*l.* Three per cent. Consols, in trust to pay certain annuities to his nephews, the defendant John Knight, and the plaintiff Thomas Knight, and some other persons, and then expressed himself as follows:

"I likewise give and devise to each of the daughters of

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Mar. 1, 2.

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[490]

KNIGHT Thomas Knight lawfully begotten, as soon as they attain the
v.
KNIGHT. age of twenty-one years, the sum of 2,000*l.*, with interest at the rate of five per cent. per annum, and to each of the sons of the said Thomas Knight lawfully begotten, as soon as he attains the age of twenty-one years, the sum of 3,000*l.*, with interest at the rate of five per cent. per annum;” and he appointed John Knight his sole executor and residuary legatee.

The testator died on the 30th of May, 1812.

Thomas Knight had several children living at the testator's death, and one named Charles, born afterwards, who were all still living, except a daughter named Isabella, who died under age. Her father was her personal representative. Some of the children were adult, others were still infants.

[*491] The bill was filed by Thomas Knight, and such of his surviving children as were born before the testator's death, against John Knight, the executor, and Charles *Knight, the child born after the testator's death. * * It prayed that interest might be computed on the legacies of all the children who were living at the testator's death: that John Knight might be directed to pay to Thomas Knight, as the personal representative of his daughter Isabella, the legacy of 2,000*l.*, and whatever should be found due in respect of interest thereof, and to pay to such of the other plaintiffs as were adult, their legacies and interest; and that the legacies of all the other plaintiffs, together with whatever should be found due for interest upon the same as aforesaid, might be paid into Court and secured for their benefit, and that a proper allowance might be made for their maintenance.

[492] J. Knight, by his answer * * insisted that the legacy of Isabella Knight was to be considered as lapsed, and ought not to be paid to Thomas Knight as her personal representative.

Mr. Sugden, and Mr. Lynch, for the plaintiffs:

As the legacies to the children living at the testator's decease were to carry interest, they vested in them immediately: *Hanson v. Graham*,† *Leake v. Robinson*.‡

† 5 R. R. 277 (6 Ves. 239).

‡ 16 R. R. 168 (2 Mer. 363).

Mr. Hart, and *Mr. Pemberton*, for the defendant John Knight [cited *Lane v. Goudge*.†] Sir WILLIAM GRANT, M.R., in deciding that case, adopts the distinction which governs the present one. Here there is no absolute gift of the interest, but it is equally contingent as the gift of the principal.

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KNIGHT.

Mr. Lynch, in reply :

[493]

The natural construction is, that the interest is payable in the meantime and until the principal is to be paid ; and that it is given in consequence of the postponement of the principal : *Stapleton v. Cheele*.‡

THE VICE-CHANCELLOR :

The expressed intention must prevail ; and there is no gift, either of principal or interest, until the daughters attain twenty-one. If the gift of the principal had been immediate, it would have borne interest only from the end of the year ; and it cannot bear interest from an earlier period, because the payment is longer delayed. The executors would not be bound to make an investment, for the security of the legatees, until the end of the year.

HENCHMAN v. THE ATTORNEY-GENERAL.

(2 Sim. & St. 498—504 ; S. C. 4 L. J. Ch. 155.)

Devise of copyhold land in fee, upon condition that the devisee, within one month, pay 2,000*l.* to the executor, to be applied for charitable purposes: Held, that in default of any heir the Crown became entitled to the 2,000*l.*

1826.
Mar. 8, 11.
LEACH, V.-C.
[498]

[THIS decision was reversed by BROUGHAM, L.C., on appeal, as reported in 3 Mylne & Keen, 485.]

1834.
Aug. 5.

† 7 R. R. 163 (9 Ves. 225).

‡ 2 Vern. 673.

1826.

March 17.

LEACH, V.-C.

[516]

HIGGINSON *v.* BARNEBY.†

(2 Sim. & St. 516—518.)

A will directed a settlement to be made of real estate on A. and his first and other sons, in tail, with powers of jointuring, leasing, sale and exchange, and all other clauses, powers and provisos usually inserted in settlements of the same kind: Held, that these last words did not authorize the insertion of a power to charge with portions.

WILLIAM HIGGINSON, Esquire, devised all his real estates to trustees, upon trust, from time to time, until one of the younger children, after named, of his niece, Elizabeth Barneby, should attain his age of twenty-two years, and until a conveyance of his estates should be made and executed as after directed, to receive the rents, issues and profits of his estates, and also of the estates after directed to be purchased with the clear residue of his personal estate, and apply so much thereof as his trustees should deem necessary in the repair and keeping in order his estates, and in payment of the maintenance after directed, and to invest the residue of the rents, issues and profits in the purchase of other real estates: and he directed that when his great-nephew Edmund Barneby, the third son of Elizabeth Barneby, should attain the age of twenty-two years, the trustees should convey all his estates, and all other the lands and hereditaments by his will directed to be purchased, unto his great-nephew Edmund Barneby and his assigns, for his natural life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of Edmund Barneby, successively, in tail general; with remainder to William Barneby, the second son of his niece Elizabeth Barneby, for his life, with remainder to trustees to preserve contingent remainders; with remainder to the first and other sons of William Barneby successively in tail general; with remainder to the testator's own right *heirs: and the testator directed that in the settlement should be contained a power for his great-nephews respectively, when in the actual possession of the hereditaments and premises thereby devised and directed to be purchased, but not otherwise, to charge

[*517]

† *Sackville-West v. Holmesdale* (1870) L. R. 4 H. L. 543.

the same hereditaments, or any competent part thereof, with any sum by way of jointure to a wife, upon his marriage, in the proportion of 100*l.* per annum for every 1,000*l.* fortune he might receive with his wife, to the extent of 500*l.* per annum, being the only charge then existing or made under such power; and if a second or after charge should be made, such second or after charge not exceeding 250*l.* per annum, until the former charge for jointure should be at an end: and his will also was that in the settlement should be contained a power to the trustees of his will, to sell or exchange any part of the hereditaments thereby devised or to be purchased under the trusts of his will; and also a power for the persons in possession of the lands and hereditaments thereby devised and to be purchased, and for his trustees in the meantime, to lease the same for twenty-one years, in possession, at rack-rents: and that there should also be contained in such settlement all other clauses, powers and provisoes as are usually inserted in settlements or deeds of that kind. And he gave and bequeathed the residue of his personal estate to the same trustees, in trust to invest the same in purchases of real estate to be conveyed to his trustees, or to such person as they should appoint, to, for, and upon the same uses, trusts, intents and purposes, and under and subject to the same limitations, powers, restrictions, conditions and agreements as were thereinbefore limited and appointed concerning his estate thereinbefore devised.

HIGGINSON
v.
BARNEBY.

The rents of the estates devised by the will, and purchased after the testator's death, produced 3,740*l.* per annum; and the interest of the residuary personal estate, and the accumulations of the rents of his real estates, not then invested in the purchase of real estates, amounted to 7,600*l.* per annum, making a total income of 11,340*l.* per annum. [518]

Edmund Barneby having attained twenty-two, and a settlement having been prepared in pursuance of the will, a question arose, upon a petition presented by him, Whether the will authorized a power to charge the estate with portions for younger children to be inserted in the settlement?

Mr. Horne and Mr. Phillimore, for the petitioner, contended

HIGGINSON *v.* BARNEY. that the direction that there should be contained in the settlement all such other clauses, powers and provisoes, as were usually inserted in settlements of that kind, did authorize the insertion of such a power.

The VICE-CHANCELLOR was of opinion that, under these words, the Court had no authority to insert in the settlement a power to appoint portions to younger children; because the effect of such a power would be to diminish the estate, which was expressly limited in strict settlement; and because there was no certain rule as to the quantum of such portions, by which the Court could be guided. He considered the words as referring to usual and necessary powers of management.

BENSLEY *v.* BURDON.†

1826.
Feb. 24,
April 13.

(2 Sim. & St. 519—527; S. C. 4 L. J. Ch. 164: on appeal, 8 L. J. Ch. 85.)

LEACH, V.-C.
[519]

A statement of fact contained in a conveyance by lease and release may operate as an estoppel; and the burden of such estoppel runs with the land in equity.

By indentures of lease and release of the 27th and 28th days of February, 1803, made between Francis Tweddell of the first part, John White of the second part, and Peter Tahourdin and Gilbert Tahourdin of the third part, after reciting that Francis Tweddell, under the will of his grandfather, was entitled to a remainder in fee, expectant upon the determination of the life estate of his father, Francis Tweddell, in certain real estates therein described, Francis Tweddell the son, in consideration of 2,200*l.*, granted to White an annuity of 264*l.*, and charged the same upon the real estates to which it was recited that he was entitled, with the usual powers of entry and distress thereon after the death of his father: and, for more effectually securing this annuity, he conveyed to Peter Tahourdin and Gilbert Tahourdin, and their heirs, "All that the reversion or remainder in fee expectant and to take effect upon the decease or other sooner determination of the estate for life of the said Francis Tweddell

† See the note at the end of this case.

the elder, and all other the contingent and reversionary estate, title and interest of him the said Francis Tweddell, the younger, of and in, &c." (describing the real estates mentioned in the recital) upon trust (in case the annuity should be nine months in arrear) to sell the same, and thereout to pay all arrears, and to invest the surplus in the purchase of stock, and apply the interest and dividends of such stock from time to time in payment of the annuity. And the indenture of release contained a covenant on behalf of Francis Tweddell the son, for further assurance.

BENSLEY
v.
BURDON.

By other indentures of lease and release of the 23rd and 24th of January, 1804, made between Francis Tweddell the younger of the first part, Alexander Burdon of the second part, and Edward Mammatt and Andrew L. Sarel of the third part, after a recital as to the Tweddells' interest in the real estates, similar to that contained in the preceding deed, and also a recital of the annuity granted by that deed, the defendant Francis Tweddell, in consideration of a sum of 4,200*l.*, granted an annuity of 700*l.* a year to the defendant Alexander Burdon, and charged this annuity in like manner upon the estates and conveyed the estates (expressly subject to the annuity of 264*l.* charged upon them by the first-mentioned deed) to the defendants Mammatt and Sarel, as trustees for the defendant Burdon, with a power of sale, and a direction as to the application of purchase-money, similar to those contained in the first-mentioned deed.

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These estates had been devised to Francis Tweddell the father, for life, with remainder to his first and other sons in tail. The defendant Francis Tweddell was the second son. In the year 1798, the eldest son, having attained his age of twenty-one years, concurred with the father in suffering a recovery and declaring uses, under which, at the time when the annuity deeds were executed, Francis Tweddell the father had an absolute power over the whole fee simple of the estates, the elder brother being then dead without issue, and Francis Tweddell the son had no interest whatever in them. In 1805 the father died, having, by his will, devised to the defendant Francis Tweddell an estate for life, without impeachment of waste, in part of the estates in question.

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v.
BURDON.
[521]

The defendant Francis Tweddell, soon after the death of his father, conveyed all the real property which he derived under the will of his father, including his life estate before mentioned, to the defendant A. Burdon, upon trust to sell the same, and out of the produce to retain 6,987*l.*, which was mentioned to be due to him from the defendant Francis Tweddell, and which was partly made up of the arrears of the annuity, and the money paid by Burdon for the purchase of it.

In 1815 White became a bankrupt.

The bill was filed by his assignees against Burdon and the trustees of both the annuity deeds. After stating the various facts already mentioned, it charged, amongst other things, that, although the defendant Tweddell had not, at the time of granting the annuities, the estate which he represented, yet that he was estopped from saying that he had not such estate, as a reason why the annuity granted to White should not be charged upon that part of the estates comprised in the annuity deeds, to which he had become entitled as tenant for life. It also charged that the defendant Burdon gave no consideration for the conveyance of the life estate; and that the sum of 6,987*l.*, which was the pretended consideration for that conveyance, consisted merely of the 4,200*l.*, the consideration money for the purchase of Burdon's annuity, together with arrears of that annuity.

[*522] It prayed that it might be declared that the life interest in that part of the estates devised to the defendant Tweddell, was chargeable with the annuity granted to White, and that the conveyance of the life *estate to Burdon was void as to the plaintiffs, or was subject to White's annuity; and that a proper deed might be executed by all necessary parties, for charging Tweddell's life estate with that annuity, and conveying that estate to trustees for that purpose; and that an account might be taken of the arrears of that annuity, and of the rents and profits of the estates, since the death of Francis Tweddell, the father, which had come to the hands of Burdon, and that he might be compelled to pay to the plaintiffs what should be found due upon taking that account, in satisfaction of the arrears of White's annuity.

The most material facts were admitted by the answer; but

Burdon denied that the sum of 6,987*l.* arose entirely in respect of the annuity granted to him by the defendant Tweddell.

BENSLEY
v.
BURDON.

Mr. Sugden, and Mr. Cooper, for the plaintiff :

To the extent of securing the annuity, the deeds of February, 1803, operate by way of estoppel. But, whatever be their operation at law, it is quite clear that, if a person assumes to sell an estate in which he has then no interest, and he afterwards acquires an interest, this Court would, on a bill being filed against him by the purchaser, compel him to execute a conveyance. And it is equally clear that a purchaser from him, with notice, would stand in the same situation as the vendor.

In the present case as the 6,987*l.* was a mere substitution for the annuity, if the equity was good against Francis Tweddell the younger, it is good against Burdon ; especially as he claims subject, expressly, to White's annuity. * * *

[523]

Mr. Heald and Mr. Ellison, for the defendant Burdon. * **

Mr. Girdlestone, jun., for the trustees.

THE VICE-CHANCELLOR :

[524]

In this case the plaintiffs appear to me to be entitled to relief at law upon the ground of estoppel. The defendant Tweddell having averred in the deed of release, which, as it regards the annuity, is also a deed of grant, that he was seised of a remainder in fee expectant upon the death of his father, if the plaintiffs were now to proceed by entry or distress, according to the terms of the deed, and the defendant Tweddell were in possession of the premises, he would be estopped from stating that at the time of the grant he was not duly seised of the estate in question according to the averments of the grant. Estoppel runs with the land, and binds not only the party, but all who claim under him : and the plaintiffs have therefore the same remedy against the possession of the defendant Burdon, as they would have had against the possession of the defendant Tweddell. The prayer of the bill is, that it may be declared that the estate and interest which the defendant Tweddell took

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in the premises in question, under the will of his father, became, and are chargeable with the payment of the annuity, subject to the term of 2,000 years. This is already declared by the law, upon the ground of estoppel. * * *

[525]

In effect the relief which is sought by this bill, is the relief which the law affords. It is said, however, that the law does not afford relief in respect of the trust estate, conveyed by the lease and release of 1803 to the defendants the Tahourdins, and that estoppel cannot be worked by lease and release, and therefore it was necessary to come into equity: and this point was treated at the Bar as too clear for argument. My impressions were otherwise; and I requested that the case might be a second time argued upon that point alone; and after hearing that second argument, I am confirmed in my opinion that estoppel is as well worked by an indenture of release as by any other indenture, and, consequently, that the estate of the

[* 526]

*Tahourdins is the same as if the defendant Tweddell had, at the date of the release of 1803, been legally seised of the remainder in question, and, as I have already stated, required no new conveyance from the defendant Burdon. The conveyance by lease and release, like all other conveyances that owe their effect to the Statute of Uses, will pass only such estate as the party conveying may lawfully pass; because the consideration paid to the party conveying cannot raise a use in any other estate than his own. But estoppel applies only to cases where the passing of an estate does not come into question. The text-writers upon this subject state that estoppel is wrought by any deed indented, making no exception as to the indenture of release: nor can I find a single authority where such a distinction is taken. Where by deed indented a man represents himself as the owner of an estate, and affects to convey it for valuable consideration, having at the time no possession or interest in the estate, and where nothing therefore can pass, whatever be the nature of the conveyance, there, if by any means he afterwards acquire an interest in the estate, he is estopped in respect of the solemnity of the instrument from saying, as against the other party to the indenture, contrary to his averment in that indenture, that he had not such interest at

the time of its execution. Is not an indenture of release as solemn an instrument as any other indenture? Of what importance to this principle can it be, whether the indenture which operates this effect by its mere character as a solemn instrument, is an indenture of release or an indenture of feoffment?

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v.
BURDON.

The plaintiffs have, therefore, their remedy at law, and I am not aware of any circumstances in this case which *compel them to seek equitable relief, or of any principle which can entitle them in equity to a different relief from that which the law affords to them. It has been argued that, admitting the estate in the Tahourdins to be effectual by way of estoppel, yet it was still necessary for the plaintiff to come into equity, because the right to sue at law is in them alone. It may be observed that the trust in the Tahourdins is merely a trust to sell, and, under all the circumstances, could hardly be exercised beneficially for the plaintiffs. But suppose it were otherwise, no case is made in this bill that it is necessary for the plaintiffs to come into equity for relief against their own trustees; and, on the contrary, the bills seeks a new conveyance to the same trustees. This case is not, therefore, made by the bill; but if it had, the Court would probably not have done more than to direct that the plaintiffs should be at liberty to sue in the names of their own trustees.

[*527]

Let the bill, therefore, be dismissed; but, considering the nature of the defendant's title, and that upon the grounds upon which the Court proceeds the bill might have been demurred to, and the great expense of the suit avoided, let the bill be

Dismissed without costs.

Note.—This judgment was subsequently confirmed by the LORD CHANCELLOR on the ground that the release contained an allegation of a particular fact by which the party making it was concluded: see *Right v. Bucknell*, 2 B. & Ad. p. 282. But the Court of King's Bench in that case held that a conveyance by lease and release being an innocent conveyance cannot operate at law to

pass the legal estate in land subsequently acquired by the grantor so as to defeat the title of a purchaser from him who has acquired the same for value without notice, and Lord ST. LEONARDS, who was leading counsel for the plaintiff in *Bensley v. Burdon*, adopted the same view in *Lloyd v. Lloyd* (1843) 4 Dr. & W. 354.—O. A. S.

FAIN v. AYERS.

1826,
April 19,
June 1.

(2 Sim. & St. 533—535; S. C. nom. *Fair v. Ayers*, 4 L. J. Ch. 166.)

LEACH, V.-C.

[533]

If a vendor retains the title deeds, and covenants for further assurance only, the purchaser may, under that covenant, compel him to produce the deeds and (probably) also to execute a covenant for their future production.

[*534]

THE bill stated indentures of lease and release, dated the 3rd and 4th of November, 1818, by which, in consideration of 170*l*. the defendant conveyed to the plaintiff a piece of freehold land, and covenanted with the plaintiff for further assurance, in the usual manner; namely, that he the defendant, and his heirs, and all persons lawfully claiming or to claim by, from, under or in trust for him or them, should and would, from time to time, and at all times thereafter, upon every reasonable request, and at the costs and charges of the plaintiff, his heirs, executors or administrators, make, do and execute, or cause and procure to be made, done and executed, all such further and other acts, deeds and assurances in the law, for more satisfactorily assuring and confirming the said premises thereby released and conveyed unto and to the use of the plaintiff, *his heirs and assigns for ever, as by the plaintiff, his heirs or assigns, or his or their counsel in the law should reasonably be devised or advised and required.

The bill then stated that this piece of land had formed part of a larger estate belonging to the defendant; that no title deeds relating to it were ever delivered to the plaintiff, nor was any express covenant entered into for the production of them; that the plaintiff had since sold the piece of land, and was advised that he could not make a good or marketable title to it without first procuring a covenant from the defendant for the production of the title deeds; but that the defendant had refused to produce them, or to enter into a covenant for that purpose.

The bill prayed that the defendant might be compelled to produce, or to execute a covenant to produce the title deeds in question, in order that the plaintiff might be enabled to make a good and marketable title to the land, the plaintiff being willing to pay all reasonable costs and charges for the same.

The defendant put in a general demurrer.

Mr. K. Parker, for the demurrer, insisted that the plaintiff had made no case for equitable relief, and had not even stated that the defendant had the title deeds in his possession.

FAIN
v.
AYER.

Mr. Stephenson, for the bill, insisted that, under the covenant for further assurance, the plaintiff had a right to call upon him to execute a covenant to produce title deeds, as being a further assurance.

The VICE-CHANCELLOR seemed inclined to think that the case made by the bill was not sufficient; but ordered the demurrer to stand for judgment.

[535]

THE VICE-CHANCELLOR :

I do not think that there has been a judicial decision upon the particular point, whether, under a covenant for further assurance in a conveyance, a new deed of covenant to produce title deeds may be required. But, whatever doubt there may be upon that point, this bill, stating that the plaintiff has resold the property, prays, alternatively, either a new deed of covenant to produce, or the actual production of the title deeds, to enable the plaintiff to show a marketable title upon his re-sale. The defendant's title deeds, being the root of the plaintiff's title, and, in that sense, a sort of common property,† I strongly incline to think that the plaintiff has an equity to that extent; and I am informed that the LORD CHANCELLOR has expressed an opinion to that effect.

. *Demurrer overruled.*

† See *Barclay v. Raine*, 24 R. R. 206 (1 Sim. & St. 449).

1826.
April 26,
May 30,
June 1, 27.

DUFFIELD *v.* ELWES.

(2 Sim. & St. 544—556; S. C. 4 L. J. Ch. 189.)

Intermediate rents on future contingent devise.

[THIS decision was reversed by the House of Lords on appeal, see 3 Bligh, N. S. 260, to be given in a later volume of the Revised Reports. The title on the appeal is erroneously stated as *Duffield v. Duffield*.]

1826.
Feb. 25,
May 5.

SMITH *v.* NELSON.†

(2 Sim. & St. 557; S. C. 4 L. J. Ch. 175.)

LEACH, V.-C.
 [557].

A purchaser under a decree is entitled to his costs where the Master reports against the title, although there is no fund in Court.

UPON a sale under a decree, the usual reference of title was made to the Master. He reported against the title. The purchaser now moved for the costs of the reference, there being no fund in Court.

Mr. Tinney, for the purchaser. * * *

Mr. Treslove, *contra*, cited *Lechmere v. Brasier*.‡

The case stood over for inquiry into the practice.

THE VICE-CHANCELLOR stated that it appeared that the cases were not uniform; and that it was not consistent with principle, that the right of the purchaser to be indemnified for expenses improperly occasioned to him by the suit, should depend upon the circumstance whether there did or not happen to be funds in Court at the time of the Master's report; and he ordered the costs to be paid by the plaintiff to the purchaser, without prejudice to the question how such costs should ultimately be satisfied.

† *Mullins v. Hussey* (1866) L. R. 1 Eq. 488, 35 L. J. Ch. 348. ‡ 22 R. R. 130 (2 J. & W. 287).

KING v. MOODY.

(2 Sim. & St. 579—591; S. C. 4 L. J. Ch. 227.)

1826.
June 6, 13.

LEACH, V.-C.

[579]

The lord of a manor being seised of it in fee, subject to an executory devise over, purchased an estate partly freehold and partly copyhold of the manor, and afterwards, under an Inclosure Act, carried in two claims, one in respect of the devised and the other in respect of the purchased estate, and obtained two allotments accordingly. He afterwards died, and the executory devise took effect: Held, that the copyhold part of the purchased estate, being extinguished in the manor, passed with it to the executory devisee, who was also entitled to so much of the allotment obtained in respect of the purchased estate as was proportionate to the value of the copyhold part: and it was referred to the Master to apportion the allotment accordingly.

[THE facts in this case, and the arguments of counsel, sufficiently appear from the judgment.]

Mr. Sugden and *Mr. Rolfe* appeared for the plaintiffs.

[587]

Mr. Horne, *Mr. Pemberton* and *Mr. Biggs Andrews*, for the defendants.

THE VICE-CHANCELLOR:

[588]

In this case, William Frost, lord of the manor of Brinkley, as tenant in fee, with a gift over by way of executory devise, purchased a certain estate, partly freehold and partly copyhold, held of the manor of Brinkley, the freehold part of which was duly conveyed, and the copyhold part duly surrendered to him and his heirs; and it is not denied that, by the effect of this surrender, the copyhold, at law, became annexed to and parcel of the manor, so as to be subject to the executory devise of the manor. It is proved in the cause by evidence, which was objected to, but which I considered myself bound to admit, that an Act of Parliament afterwards passed for inclosing lands in the parish of Brinkley; and that William Frost, mistakenly considering that, by the effect of his purchase and the surrender to him, the copyhold, as well as the freehold which he had purchased with it, had become his fee-simple estate, carried in to the commissioners under the Inclosure Act two claims, one for his entailed estate, meaning thereby the estate limited over by way of executory

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v.
MOODY.

[*589]

devise, excluding therefrom the copyhold which had become parcel of the manor, and the other, for his estate in fee, including in the description of the latter estate the copyhold part of the purchased estate; and the commissioners, adopting his mistaken view of the case, made two distinct allotments for what he called his entailed estate, and for what he called his estate in fee, including in the latter an allotment *in respect of the copyhold part of the estate purchased.

William Frost is since dead; and the executory devise over of the manor of Brinkley having taken effect in favour of the plaintiffs, the present bill is filed for the purpose of having it determined what part of the allotment so professed to be taken for the estate in fee of William Frost, is to be considered as having been made in respect of what had been copyhold, the plaintiffs insisting that such copyhold having become parcel of the manor, they, and not the defendants, who are the general residuary devisees of William Frost, are entitled to this portion of the allotment, and the case of *St. Paul v. Lord Dudley*,† is relied upon by them as in point.

For the defendants it has been first argued that the question whether, by the surrender, the copyhold did or not become parcel of the manor, is a mere legal question, and that the plaintiffs ought to be left to law. The obvious answer is, that one allotment being made in respect of the whole purchased estate, the plaintiffs cannot recover at law any particular portion of the allotment, as belonging to the part which had been copyhold, and the plaintiffs are necessarily driven into equity in order to have a certain parcel of the allotment set out by a court of equity, as being equivalent to the proportionable value between the freehold and copyhold.

[*590]

It is next argued that William Frost, by including in his claim what had been copyhold, as a part of his own estate in fee, plainly manifested that it was not his *intention that it should become parcel of the manor, but should remain at his disposal; and as he had the power during his life to separate it again from the manor, it is to be inferred that he would have done so if he had not mistaken the law; and that a court of equity, there-

† 10 R. R. 57 (15 Ves. 167).

fore, will not assist the plaintiffs against the actual intention of the real owner of the property.

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v.
MOODY.

Where by law a certain act is necessary in order to give effect to intention, Courts of Justice are disinclined to infer a perfect intention where the act required is not done, as in the case of a will of lands not duly attested ; and in the case referred to, Lord Dudley, as to the copyhold within the manor of Kingswinford, had manifested the same ignorance of the law, and the same intention that the copyhold purchased and surrendered to him should not be annexed to and descend with the manor, by comprising it in the mortgage to Smith, for the sum of 8,000*l.* borrowed by him ; and though the LORD CHANCELLOR held that the mortgagee might have compelled the remainder-man to re-grant the copyhold, according to the covenant to surrender in the mortgage deed, yet no such re-grant having been made, he was of opinion that Lord Dudley's general devisees had no equity against the remainder-man. If, in such cases, the devisee has no equity, it can make no difference whether the remainder-man be defendant, as in the case of *St. Paul v. Lord Dudley*, or plaintiff, as in this case.

Declare that the plaintiffs are entitled to so much of the allotment, professed to be made in respect of the estate in fee of William Frost, as was actually made in respect of the copyhold land surrendered to him and his *heirs by John Purchas, the elder, and John Purchas, the younger, and William J. Purchas, on the 21st of November, 1809 ; and refer it to the Master to apportion the said allotment accordingly ; and let the defendant deliver up to the plaintiffs the possession of that part of the allotment which the Master shall so apportion to the plaintiffs in respect of the said copyhold lands ; and let the Master take an account of the rents and profits of the said allotment which have arisen, or become due, since the death of the said William Frost ; and let him apportion the said rents and profits, and ascertain and state how much of such rents and profits is to be attributed to that part of the said allotment which he shall find to belong to the plaintiffs, according to the declaration aforesaid ; and let the defendants pay the amount of such rents and profits to the plaintiffs, Robert King and Rebecca his wife ; and let any party interested be at liberty to apply as they shall be advised.

[*591]

1826.
May 30,
July 8.

THE TRUSTEES OF THE BRITISH MUSEUM v. WHITE.†

LEACH, V.-C.
[594]

(2 Sim. & St. 594—596 ; S. C. 4 L. J. Ch. 206.)

A devise to the British Museum is within the Statute of Mortmain ; and so is every devise for a public purpose, whether local or general.

WILLIAM WHITE, deceased, devised a freehold estate to trustees, in trust to sell it, and pay the proceeds, together with his residuary personal estate, to the trustees of the British Museum, to be by them employed for the benefit of that institution. The question was whether this devise was void under the 9th Geo. II. c. 36.

The *Solicitor-General*, Mr. Bligh, and Mr. Coote, for the Trustees of the Museum :

The British Museum is not a charitable institution. It was founded by the munificence of the State for the benefit of the public. Every gift for the use of the public is not, necessarily, a charity. There must be something in the nature of relief to constitute a charity. Gifts to support a public bridge, and for the repair of sea-banks, have, on that principle, been held to be charitable gifts. So schools for learning have *been held to be charitable institutions : not so schools of art.† Now this is a school of art. Besides, the Museum is national property : and, for that reason, it was held, in *Thellusson v. Woodford*,§ that the devise to the King, for the use of the Sinking Fund, was good.

But if the British Museum should be held to be a charitable institution, still this devise is good, under the 26th Geo. II. c. 22, by which the Museum was established : for it is thereby enacted|| : “That, for the better execution of the purposes of this Act, the said trustees, hereby appointed, shall be a body politic and corporate in deed and name, and have succession for ever, by the name of ‘The Trustees of the British Museum ;’ and, by that name, shall sue and be sued, implead and be impleaded, in all courts and places within this realm, and shall

† See now the Mortmain and Charitable Uses Act, 1891—O. A. S. § 4 R. R. 205 ; 8 R. R. 104 (4 Ves. 227 ; 11 Ves. 112).

‡ Duke, 128.

|| See sect. 14.

have power to have and use a common seal, to be appointed by themselves, and to make bye-laws and ordinances, for the purposes of this Act; and to assemble together, when, where, and as often, and upon such notice, as to them shall seem meet, for the execution of the trust hereby in them reposed; and shall also have full power, capacity and ability to purchase, take, hold, and enjoy, for the purposes of this Act, as well goods and chattels, as lands, tenements and hereditaments, so as the yearly value of such lands shall not exceed 500*l.* above all charges and reprises, the Statute of Mortmain, or any other statute and law to the contrary thereof, in any wise notwithstanding."

BRITISH
MUSEUM
v.
WHITE.

Mr. Horne, and *Mr. Parker*, for the defendant, the testator's heir, contended that the British Museum was no more national property than a hospital, or college of Royal foundation; and that the devise in question was void, as being within the Statute of Mortmain.

[596]

THE VICE-CHANCELLOR :

It has long been settled, by authority, that a gift of the price of land is, in effect, a gift of land within the 9th Geo. II.; because it is possible that the land itself may be acquired by means of such a gift. In *Mr. Thellusson's* will there was a residuary gift, in certain events, towards payment of the National Debt; but those events have not yet happened, nor probably ever will happen; and no decision has yet taken place with respect to the validity of that gift. But, in this will, there is no such gift to the nation; but a gift to an institution, established by the Legislature, for the collection and preservation of objects of science and of art, partly supplied at the public expense, and partly from individual liberality, and intended for the public improvement. I consider that every gift for a public purpose, whether local or general, is within the 9th Geo. II., although not a charitable use within the common and narrow sense of those words: and, consequently, I must declare this devise void as to the real estate.†

† See *Att.-Gen. v. Heelis*, ante, p. 153.

LAW JOURNAL (OLD SERIES) CHANCERY REPORTS.

With few exceptions, those Chancery cases reported in the first few volumes of the Law Journal which are of any permanent interest are also reported in the regular contemporaneous reports by Simons & Stuart and Simons, and are usually cited from those reports. Hence comparatively few reports of Chancery cases have been taken from the early volumes of the Law Journal for the Revised Reports.—O. A. S.

NEWHAM *v.* NEWHAM.

(1 L. J. Ch. 23—24.)

1822.

Nov.

LEACH, V.-C.

[23]

Where the estate of a trustee is secondarily liable in consequence of a breach of trust by a co-trustee, the *cestui que trust* is bound to pursue his demand against the former estate with due diligence.

Expenditure by a guardian during minority ratified by subsequent adoption.

THE plaintiff was entitled, under his father's will, to a considerable real estate, and, subject to an annuity to the plaintiff's mother, to the residue of the personal estate. The mother was sole executrix of the will, and sole guardian of the plaintiff; his uncle was a trustee of the real estate.

During the infancy of the plaintiff a considerable sum of money, part of the personal estate of his father, had been invested in the 3 per cents. in the names of the mother and the uncle. That sum had afterwards been sold out, and was expended by the mother. The bill sought to charge the mother and her second husband, and the personal representative of the uncle, with the sum so expended. The plaintiff had come of age in 1804, and had not for fifteen years afterwards expressed any dissatisfaction with his mother's management during his minority.

The defence was, that the money had been expended in improving the plaintiff's real estate;—that the expenditure had been very advantageous to him;—and that after the attainment of his full age, he had ratified and approved it.

THE VICE-CHANCELLOR :

The equity of the plaintiff, as between him and his mother, is different from the equity, as between him and his uncle's representative. The uncle became a trustee of the money, which was

invested in his name and that of the mother jointly; and if, in consequence of his placing that money at the sole disposition of the mother, it were misapplied, his estate might be chargeable. But if the plaintiff meant to make any claim against the uncle, he ought to have made it with due diligence; for the uncle's estate was not primarily liable; and therefore any *demand, which he might have against it, ought to have been prosecuted without delay, that those who represented it, might pursue their remedy against the estate primarily liable. It would be difficult to hold, after so many years' delay, that this plaintiff is entitled to any remedy against his uncle's personal representative.

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v.
NEWHAM.

[*24]

As to the question between the plaintiff and his mother, she would be discharged, either if the expenditure had been advantageous to the property, even though he had always disputed it; or if he had acceded to it, even though it had not been in itself profitable or prudent.

After his Honour had expressed his opinion, letters of the son were read, in which it appeared that for many years after he came of age, being perfectly well acquainted with the state of the accounts between him and his mother, he had over and over again admitted the sums in question as expended by her on his account, and allowed her interest on the same. His bill was accordingly

Dismissed.

His Honour added, that the case would have stood on a quite different footing if the plaintiff had alleged in his bill, and had proved, that after he came of age his mother made certain representations to him; that, confiding in her representations, he then acquiesced in the accounts as she stated them; that he had subsequently discovered that the money in question had been either not expended by her on the estate, or improperly expended; and that ever from the time of such discovery, he had disputed her accounts.

1822.

Nov. 18, 19.

LEACH, V.-C.

[43]

ATTORNEY-GENERAL v. JOLLIFFE.

(1 L. J. (Ch.) 43—48.)

The mode in which a court of equity judges of the conduct of trustees of charitable institutions. The Court will not visit slight irregularities with severe censure, where the trustees have not acted from corrupt motives.

THIS information set forth a number of abuses, which were alleged to exist in the administration of a charitable institution, called Churcher College, in the borough of Petersfield. This charity had been established under the will of a person of the name of Churcher, who gave certain funds (consisting, at present, principally of Bank stock) for educating, lodging, clothing, and boarding boys belonging to Petersfield. The trusts were to be executed by seven trustees; and, when any vacancy occurred, the remaining trustees had the power of filling it up. The will contained very minute rules for the conduct of the charity, which had been subsequently modified by an Act of Parliament. The information contained a vast number of different charges against the trustees; but the following were the only points to which the attention of the Court was directed.

The trustees had been in the habit of naming one of their number to act as treasurer. Mr. William Jolliffe, the father of Mr. Hylton Jolliffe, had filled this situation till his death, in 1803, when he was succeeded in it by his son. The information charged, that, at the time of his death, he was indebted to the charity in the sum of 1,650*l.* and upwards;—that that sum, with the interest accrued thereon, was still due from his estate, and ought to be paid by his executor, Mr. Hylton Jolliffe, who, it was alleged, had been guilty of a breach of trust, in suffering this claim of the charity, to which he was treasurer, to remain unsatisfied and unnoticed.

The defence set up by the answer of Mr. H. Jolliffe to this charge was, that his father had died insolvent, and that he had not left assets for the payment of his debts. He offered, however, to pay whatever should be found due from the estate of Mr. W. Jolliffe to the charity.

* * * *

The information further alleged, that boys, not sons of inhabitants of Petersfield, had been admitted upon this charitable foundation, and that the master had been long in the habit of taking boarders, instead of directing his attention to the college boys. A room had been built for the accommodation of these boarders, which, it was alleged, was an improper expenditure of the charity funds. The boys were neither lodged, nor clothed, nor boarded, nor were premiums given them, nor were they apprenticed out; though the will of the founder had provided for all these things.

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v.
JOLLIFFE.

The answer to these charges set up by the defendants was, that the funds had not been sufficient to carry into effect the various ends pointed out by the will of the founder, and that the salary which the charity could allow the master was insufficient, unless he were permitted to add to his emoluments by taking boarders. It was denied that any boys who were known to the trustees not to be sons of inhabitants of Petersfield had ever been placed upon the foundation.

Another charge was that, though the will of Churcher required the master to be a layman, that office had, many years ago, been filled by a gentleman in holy orders. It was also charged that the predecessor *of the present master was still receiving an annual payment out of the fund.

[*44]

A further charge was that the trustees were all of the family of Jolliffe, or nearly connected with that family, and that several of them had been improperly appointed. By the will, and by the Act of Parliament for the regulation of the charity, it was provided, that, upon the death or resignation of a trustee, a new trustee should be appointed by the surviving trustees, or the major part of them. John Twyford Jolliffe had been appointed on the 23rd of September, 1807, by three of the trustees only. This appointment, therefore, was, it was said, irregular. Next, the Rev. Charles Edward Twyford (a cousin of the Jolliffes) was appointed, in October, 1814, by two of the trustees, Hylton Jolliffe and Samuel Twyford. Then, on the 19th of July, 1814, the Rev. Thomas Robert Jolliffe was named a trustee by four of the existing trustees. But of these four, Charles Edward Twyford, who had himself been im-

ATT.-GEN. properly elected, was one; and, therefore, this last appointment
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JOLLIFFE. was also illegal.

Some of the trustees, too, it was charged, never attended, though the will of Churcher required them to meet at least once a year, and audit the accounts. Thomas Samuel Jolliffe had not been present at any of the meetings for twenty-three years previous to the filing of the information.

The information prayed for the requisite accounts, and the removal of the trustees.

Mr. Wetherell, Mr. Heald, and Mr. Glynn, appeared for the relators.

Mr. Horne and Mr. Skirrow, for the defendants.

[The argument for the information sufficiently appears from the judgment.]

THE VICE-CHANCELLOR :

It is undoubtedly the duty of this Court, whenever trustees are charged with having acted from corrupt motives in the execution of their office, with respect either to the property of the charity, or to the authority and influence which they enjoy as trustees, to listen to the complaint with the most jealous attention. On the other hand, if no corrupt motives are imputed to trustees, but they have failed in some matters of regulation, gone wrong through mere error in some of the rules and orders which belong to the charity,—then it is the duty of the Court to listen to the complaint, though with great attention, yet with great moderation; and, as far as it can, to protect such trustees, instead of visiting them either with penal orders, or with such observations as may affect their character in the world.

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The greater part of the complaints made upon this information, are entirely of the latter description. It is not imputed to any of the parties concerned in the management of this charity, that they have used the property or power possessed by them as trustees, with corrupt motives. I state this with one single

exception, though that exception is undoubtedly an important one. I allude to the charge made against Mr. Hylton Jolliffe, with respect to the sum of 1,650*l*.

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v.
JOLLIFFE.

[The VICE-CHANCELLOR, after expressing his intention to direct an enquiry whether Mr. William Jolliffe died indebted to the charity in any, and what sum ; and whether Mr. Hylton Jolliffe, his son and executor, possessed assets of the father applicable to the payment of that debt, or of any and what part of it, continued as follows :]

With this single exception, there is no corruption ascribed to these gentlemen—but there is much alleged irregularity. It is said, that, by the will of the founder, the boys should be furnished with clothing, and board and lodging, but that for many years they have neither been boarded nor lodged, and that this is a degree of negligence on the part of the defendants in the discharge of their duties, which proves them unfit to remain trustees. To this charge they answer, that the funds of the charity have been totally inadequate to its purposes ;—that they have duly administered every shilling received on account of the college, and that its income was not sufficient to meet the expense of lodging and boarding the boys. “It is very true,” say the defendants, “that there have been boarders in the house, but they have been boarded at the expense of their respective parents, and we, as well as our predecessors, have considered this practice extremely beneficial to the charity. The will of the founder provides for the master a salary of only 40*l*. per annum, which is totally inadequate for the support of a person qualified to give the requisite instruction : and it has been thought a fit thing by us and our predecessors to permit him to receive boarders into the house, which was intended for the boarding and lodging of the charity boys, but, for want of funds to maintain them, was never so employed ; in order that, by the profit arising from these boarders, his income might be increased to such an amount, as would form a more adequate remuneration to a person qualified to fill the situation.” Such is the statement made upon oath : and, taking the facts to be as stated, these trustees have exercised a sound discretion. They have resorted to the same means which have been adopted by all the great charities of this description in the

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v.
JOLLIFFE.

kingdom, and by the adoption of which these institutions have acquired a proud distinction over those of every country on the continent. So far, therefore, no matter of imputation exists.

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[The VICE-CHANCELLOR then dealt with other alleged irregularities and, at his suggestion, two of the seven trustees, who had not acted for many years, consented to retire, and in addition to the enquiry already mentioned] the Master was also to enquire whether the remaining five trustees were duly elected, the consideration of the appointment of new trustees being reserved until after the report should be made.

* * * * *

1823.
April 22, 23,
24.

LEACH, V.-C.
[191]

PEYTON v. ROBINSON.

(1 L. J. (Ch.) 191.)

A person, before he accepts a trusteeship, to which a discretionary power is annexed, is bound to disclose any circumstances in his situation which give him a bias or an interest against the due exercise of that discretionary power.

If he accepts the trusteeship, without disclosing such circumstances in his situation, he cannot afterwards exercise the discretionary authority for his own benefit.

THE bill was filed by Mrs. Peyton. It sought to compel Robinson and Bond, who were the trustees of her marriage settlement, to repay certain sums, part of the trust monies, which had been applied by the trustees in the satisfaction of debts due from the husband to Robinson, and of engagements entered into by Robinson, as surety for the husband.

The facts of the case made by the bill, so far as they were admitted in the answers, or established by evidence, are stated in the VICE-CHANCELLOR's judgment.

THE VICE-CHANCELLOR :

There is a plain principle of courts of equity, which, as soon as it was stated, ought to have convinced all parties, that the transactions impeached by this bill could not be maintained. The lady, who now appears as one of the plaintiffs, being entitled to a fortune of eight or nine thousand pounds, and being

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about to marry a gentleman in embarrassed circumstances, it became necessary for her to make such a provision for him as should secure to her the benefits of his society, and enable him to apply his industry in life for the advantage of his family. She appropriates 2,000*l.* for this purpose; and is advised by Robinson not to put it absolutely in the disposition of the husband, but to place it in the hands of the trustees of her settlement, in order that it may be advanced according to their discretion for his use. This sum is accordingly put at the disposition of the trustees, Robinson and Bond; and a clause is introduced into the settlement, empowering them to advance any part of the 2,000*l.* to the husband by way of loan, taking a bond to enable them to claim repayment upon his death, and to prove it as a debt, if he should become a bankrupt. This authority required the trustees not to advance a shilling of the money, unless to promote the purposes of the trust—in other words, to enable Mr. Peyton to act for the advantage of his family.

What they have done is this :—They have exercised their discretion by placing 1,000*l.* in the hands of Robinson, for the purpose of paying a personal debt of more than 400*l.*, due to him from Peyton, and of satisfying other engagements of nearly equal amount, into which he had entered for Peyton, without ever inquiring what the other embarrassments of this gentleman were, or considering whether he was likely to be thus relieved from all debts, and aided in establishing himself in life. They have imagined, that they discharged their duty by simply paying Robinson his claims, and exonerating him from his engagements. Now, Robinson having entirely concealed from this lady that he stood in the relation of a creditor of her intended husband, and of a surety for his debts, having obtained her confidence, under the notion that he was an indifferent person, having been placed by her in the situation of trustee, without her knowing that he had a personal bias against the discharge of his duty—it is a clear principle of equity, that he cannot be allowed to use for his own benefit, and for his own benefit only, the authority and discretion with which he was so invested.

* * * * *

BOEHM v. WOOD.

(1 L. J. Ch. 234—235.)

1823.

July 25.

LEACH, V.-C.

[234]

A purchaser will be charged with interest on his purchase money, only from the time when, with reasonable diligence on his part, the conveyance might have been completed.

Though a purchaser has the benefit of the increased value of ornamental timber, by reason of its growth during the years that have intervened between his agreement and the time from which he is considered as in possession of the land, he will not in respect of that benefit be charged with interest on any part of the purchase money.

In this suit, which was instituted by a vendor against a purchaser for specific performance, the Master on the 29th of July, 1822, reported, that a good title could be made to the premises. The report had been resisted by the defendant, but without success; and the only question that now remained was, as to the time from which interest should be calculated on the purchase money.

Several years had elapsed since the time fixed by the agreement for paying the purchase money, and taking possession. The timber on the estate constituted a considerable part of the value of it.

Mr. Sugden and *Mr. Preston* contended, that as the purchaser had the benefit of the increased value of the trees arising from the growth, during the years that had intervened, since the contract was entered into, he ought to be considered as having been all along in possession of so much of the property; and that consequently interest on a proportional part of the price should be calculated, from the day fixed by the agreement, for the completion of the purchase.

Mr. Wetherell and *Mr. Simpinson*, for the defendant.

THE VICE-CHANCELLOR :

[*235] A court of equity considers a person as having done that which he ought to have done, from the *time when it was his duty to have done it. If then he buys an estate, and a time is fixed for paying the money, he will be charged with interest from that time up to the day of actual payment, unless he has

been prevented by the negligence or misconduct of the vendor, from taking possession, or having a valid conveyance.

In the present case the estate was bought for the purpose, not of profit, but of pleasurable occupation; and down to the 9th of July, 1822, that pleasurable possession was prevented by the incapacity of the vendors to make a good title. There is, therefore, no pretext for charging the defendant with interest previous to that time. On the 29th of July, the Master reported that the purchaser might accept the possession; and all the subsequent delay has been occasioned by his having questioned unsuccessfully the Master's opinion. I do not mean that he could have taken possession on the very day on which the report was made; for there still remained a question or two behind with respect to the compensation that was to be made in respect to title, &c. But with reasonable diligence the conveyance might have been completed by the 29th of September. From that day, therefore, he must be considered as in possession, and charged with interest on his purchase money.

But then it is said that the defendant has in fact been in possession of the timber, since the time when the contract was entered into; for he has the benefit of the increased value of its growth during the interval. If the timber was appurtenant to this estate in respect of profit only, it would be impossible to meet that argument; but if it is appurtenant as matter of ornament, the necessary consequence is, that the value derived from the pleasurable possession of ornamental timber is annexed to the pleasurable possession of the premises. This is at least a mixed case—a case in which the timber is partly profitable, and partly ornamental; and I cannot make a distinction, between what is to come under the one description, and what under the other. I therefore cannot adopt the notion of argumentative possession.

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v.
WOOD.

1823.

Aug. 8, 9.

LEACH, V.-C.

[239]

LORD BYRON v. DUGDALE.

(1 L. J. Ch. 239—240.)

Where there is a fair doubt whether the law would give damages for the piracy of a work, a court of equity will not maintain an injunction granted *ex parte*, but will leave the plaintiff to establish his legal right, before it interferes on his behalf.

THE bill was filed to restrain the defendant from selling a pirated edition of the 6th, the 7th, and the 8th Cantos of "Don Juan ;" and, as soon as the bill was filed, the injunction had been obtained upon an *ex-parte* application.

The defendant now moved to dissolve the injunction. The grounds on which he contended that it ought to be dissolved, were,—that the work sought to be protected was immoral, irreligious, and unfriendly to regular government. He quoted many particular passages, commenting on the licentiousness which pervaded them, and on the marked disrespect towards the morals, the religion, and the political institutions of England, expressed in them.

Mr. Wakefield, contrà, insisted, that a book addressed to the imagination, as this was, ought not to be tried by such severe rules as professed works of science and of reasoning ; that the licentiousness imputed to it, was merely the powerful exhibition of scenes and feelings, which almost every poet loved to delineate ; that the passages cited as impure, were impure only to an impure mind ; that the work contained much bad taste and many bad jokes, but that these faults ought not to deprive it of the protection of law : and that, even if the work were as bad as it had been represented to be, the objection ought not to be listened to, when it came from a defendant like the present, who was in truth asserting, that he ought to be allowed to sell the book without restraint, because the book ought not to be sold at all. *Mr. Wakefield* further argued, that an indictment or information for libel, could not be sustained against Lord Byron for this publication, and that an injunction ought to be granted, unless the work were clearly libellous.

THE VICE-CHANCELLOR :

This is a case of very great importance on account of the

principle involved in it. The primary remedy for a breach of copyright is at law. But the remedy at law is imperfect; the damages obtained may never be paid, and the mischief may continue, notwithstanding the judgment recovered. Equity then steps in to supply the defect of the law, and to secure completely by injunction those rights which an action at law would protect but imperfectly.

LORD BYRON
DUGDALE.

Considering, therefore, the nature and origin of the jurisdiction, it is clear, that a work, to which reparation in damages would be refused, cannot possibly be protected in this Court; for the injunction, being granted merely to render effectual the legal right, to which law can afford only *an imperfect remedy, will not issue, where the law, by refusing reparation in damages, refuses to acknowledge any legal right. Then the question is, What is the principle on which courts of law refuse reparation in damages? Do they refuse damages, only where the work might be made the subject of an action for libel, or of criminal proceeding? Even if this were so,—even if there was a legal right, wherever the publication could not be the subject of an indictment or an information,—yet it would not follow as of course, that such a legal right could claim the extraordinary interference of this Court; for a publication, which could not be prosecuted as a libel, might be of such a general loose and immoral tendency, that the Court might hesitate before it would grant its assistance. Equity, though it will not go beyond the law, will not always follow the law to its utmost point. I acted on this principle, six months ago, in the case of a foolish trifling song, which I refused to protect.

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It is alleged that this work is one, in respect of which an action for damages could not be maintained. Must I not, then, say to this plaintiff: "If law will give no damages, equity cannot interfere. Go, therefore, into a court of law; and then come back here,—necessarily not to succeed, if damages are refused you, but not necessarily to succeed, if the law does give damages"? The objection to this course is, that, as the result at law is not necessarily to decide the question, a court of equity should, in the first instance, exercise its own judgment on the case. But, in the event of one result at law,—the refusal of

LORD BYRON damages,—the question will be at an end; and it will be an
v.
DUGDALE. assistance to the Court to know whether this publication falls
within the class of works to which the rule of law refuses legal
protection.

If there be the least doubt as to the validity of a patent, the Court will not grant an injunction in the first instance; all that it does, is to direct the party to keep an account of his sales.

Looking to the whole constitution and practice of courts of equity, my present impression is against this injunction. A court of equity has no original jurisdiction in matters of copyright; it interferes in them only to give a complete remedy, when the remedy at law is incomplete; where a court of law will refuse damages, there a court of equity must withhold its injunction; where law will give damages, there equity will, in general, grant an injunction; if, therefore, there is any real question, whether damages could be recovered, that question must be determined at law, before this Court will interfere.

August 9.
—

His Honour took the same view of the subject which he had stated on the preceding day, and ordered the injunction to be dissolved, leaving Lord Byron to bring his action at law, and directing the defendant, in the mean time, to keep an account of his sales.

His Honour added that he was disposed to think that the plaintiff, if he obtained damages at law, would be entitled to his injunction.

K. B. MICHAELMAS TERM.

HOLBROW AND ANOTHER v. WILKINS.†

(1 Barn. & Cress. 10—12; S. C. 2 Dowl. & Ry. 59; 1 L. J. K. B. 11.)

1822.
Nov. 9.

[10]

The plaintiffs sold goods to C. and P., and took their acceptance for the amount, half of which was guaranteed by the defendant. Before the bill became due, C. and P. became insolvent, of which the defendant was then informed, and he was also informed that the plaintiffs looked to him for the sum which he had guaranteed: Held, that, under these circumstances, it was unnecessary for the plaintiffs to present the bill when due, or give the defendant notice of the non-payment of it.

ASSUMPSIT on a guaranty. Plea, general issue.

At the trial before Abbott, Ch. J. at the London sittings after last Trinity Term, the following facts appeared. The plaintiffs were merchants residing at Stroud in Gloucestershire. The defendant was a commission-broker in the city of London. In the month of *February, 1818, the latter sold wools for the plaintiffs to Messrs. Carver and Peat, to the value of 1,122*l.* 12*s.* for which they accepted a bill payable at eight months, and the defendant agreed to guarantee half the amount for an allowance of 1*l.* per cent. The bill became due on the 29th of October, 1818. About the 4th of September in the same year, Carver and Peat became insolvent, and on the 22nd of that month the plaintiffs wrote to the defendant requesting him to accept a bill at one month for the sum guaranteed by him, which he refused to do. The bill accepted by Carver and Peat was not presented when due, nor was any notice of the non-payment given to the defendant. The bill would not have been paid if presented, and it did not appear that the defendant sustained any damage by reason of the want of presentment and notice. A verdict was found for the plaintiffs, which

[*11]

Denman now moved to set aside and enter a nonsuit:

According to *Philips v. Astling*,‡ where a guaranty is given

† Bills of Exchange Act, 1882, § 50 (2).
‡ 11 R. R. 547 (2 Taunt. 206).

HOLBROW
v.
WILKINS.

for the price of goods which are to be paid for by bill due notice of the dishonour must be given to the surety; and the present case is distinguishable from *Murray v. King*,† which was an action on a bond. And to have held the want of notice a sufficient plea, in that case, would have been adding a new term to the condition of the bond.

ABBOTT, Ch. J.:

[*12]

The case of *Philips v. Astling* differs very materially from this. The insolvency in that case did not happen until after the bill became due. *In the present instance, so early as the 22nd of September, the defendant had notice that Carver and Peat were insolvent, and that the plaintiffs would look to him for payment.

BAYLEY, J.:

Here the defendant was not a party to the bill; the case of *Swinyard v. Bowes*‡ is therefore, precisely in point against him.

HOLROYD and BEST, JJ. concurred.

Rule refused.

1822.
Nov. 13.
[21]

THE KING v. KIRK.

(1 Barn. & Cress. 21—23; S. C. nom. *R. v. Denbighshire Justices*, 2 Dowl. & Ry. 52.)

An order of justices for diverting a highway stated that the new road was to pass through the lands of the late T. J., and that the justices had received evidence of the consent of the said T. J. in his lifetime: Held, that this order was bad, because it did not thereby appear that T. J. was the owner of the estate at the time when the order was made.

AN order of two justices for the county of Denbigh, made at a special Sessions held on the 7th of June, 1821, recited that they had found, upon view, that a certain part of a highway therein particularly described, by reference to a plan annexed to the order, might be diverted and turned, so as to make the same nearer and more commodious to the public; and that they had viewed a course in lieu thereof, therein also particularly described,

† 5 B. & Ald. 165.

‡ 17 R. R. 274 (5 M. & S. 62).

by reference to the same plan, part of which new road was to pass through the lands and grounds of the late Thomas Jones, Esq. The order then stated that they had received evidence of the consent of the said T. Jones, Esq., in his lifetime, to the said part of the new road being made and continued through his lands, by writing under his hand and seal; and directed the road to be diverted and turned accordingly. The Sessions, on appeal, having confirmed this order, it was removed into this Court by *certiorari*, and a rule *nisi* had been obtained for quashing it, and the order of Sessions confirming it; against which

THE KING
v.
KIRK.

Marryat now shewed cause:

By 55 Geo. III. c. 68, s. 2,† it is enacted, that when it shall appear, upon the view of two justices, that any public highway may be diverted so as to make the same nearer or more commodious to the public, and the owner of the lands through which such new highway so proposed to be made shall consent thereto, by writing under his hand and seal, it shall be lawful for the justices to divert such highway, and by *such means, and subject to such exceptions and conditions as are contained in the 13 Geo. III. c. 78. Now, by the 70th section of the latter statute, the justices are bound to pursue the form given in the schedule thereto: *Davison v. Gill*.‡ The order in this case is copied from the form given in the schedule to that statute; and the question is, whether it sufficiently appears, on the face of it, that the consent of the owner of the lands, through which the new road was to pass, was obtained. Now every intendment ought to be made in favour of the order. It clearly appears that the consent of T. Jones, who had been the owner, was obtained; and once given, it could not be revoked. It was binding upon any person to whom the lands afterwards came. If this were not so, it would be most inconvenient; for it would be competent to a subsequent purchaser of the estate to revoke the consent given by the former

[*22]

† Repealed by 5 & 6 Will. IV. c. 50, s. 1. The procedure under 5 & 6 Will. IV. c. 50, ss. 85 *et seq.*, is different; but the decision of the above case may still have some application. Mr. Glen (Highways), after citing the

case, says:—"Under the present Act (5 & 6 Will. IV. c. 50), therefore, the consent of the person who is owner when the justices' certificate is made should be obtained."—R. C.

‡ 1 East, 64.

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owner, even after all the expense of making the new road had been incurred : besides, by 55 Geo. III. c. 68, s. 3, the Sessions are authorised finally to determine the appeal ; and they have confirmed the order.†

ABBOTT, Ch. J. :

[*23]

I am of opinion that this order must be quashed. It seems to me that the proper construction of the statute will be, to hold that there must be a consent of the person who is the owner of the estate at the time when the order is made. Now, here it does not appear, upon the face of the order, that the person whose consent was obtained was alive, either at the time when the order was made, or at any time after the *proceedings had commenced ; for it is not stated whether the consent was given before or after the justices had made their view. Our present decision will not affect the question, whether the owner of an estate may revoke a consent given by a former owner who was alive, and consenting at the time the order was made ; we only decide, that it must appear on the face of the order that the consent of the person who is the owner at the time when the order is made, has been obtained.

Order of Sessions quashed.

1822.
Nov. 14.

[26]

THE KING v. WADDINGTON.†

(1 Barn. & Cress. 26—29 ; S. C. 1 L. J. K. B. 37.)

A publication stating Jesus Christ to be an impostor and a murderer in principle, is a libel at common law.

THIS was an information by the Attorney-General against the defendant for a blasphemous libel. The effect of the libel set out in the information was to impugn the authenticity of the Scriptures ; and one part of it stated that Jesus Christ was an

† But see *Rex v. Sheppard*, 3 B. & Ald. 417, where it is held, that, notwithstanding this, the *certiorari* is not taken away.

† Cited by Lord COLERIDGE in his charge to the jury in *R. v. Ramsey* (1883) 48 L. T. 733, 737, 15 Cox, C. C. 231, 327.—R. C.

impostor and a murderer in principle, and a fanatic. The defendant was tried at the Middlesex sittings after last Trinity Term, and convicted. Before the verdict was pronounced, one of the jurymen asked the LORD CHIEF JUSTICE, whether a work which denied the divinity of our Saviour was a libel. The LORD CHIEF JUSTICE answered, that a work speaking of Jesus Christ in the language used in the publication in question was a libel; Christianity being a part of the law of the land. The defendant, in person, now moved for a new trial; and urged that the LORD CHIEF JUSTICE had misdirected the jury, by stating that any publication in which the divinity of Jesus Christ was denied was an unlawful libel; and he argued, that since the 53 Geo. III. c. 160† was passed, the denying one of the persons of the Trinity to be God was no offence; and, consequently, that a publication in support of such a position was not a libel.

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ABBOTT, Ch. J. :

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I told the jury, that any publication in which our Saviour was spoken of in the language used in the publication for which the defendant was prosecuted, was a libel. I have no doubt whatever that it is a libel to publish that our Saviour was an impostor and a murderer in principle.

BAYLEY, J. :

It appears to me, that the direction of my LORD CHIEF JUSTICE was perfectly right. The 53 Geo. III. c. 160, removes the penalties imposed by certain statutes referred to in the Act, and leaves the common law as it stood before. There cannot be any doubt, that a work which does not merely deny the Godhead of Jesus Christ, but which states him to be an impostor and a murderer in principle, was, at common law, and still is, a libel.

HOLROYD, J. :

I have no doubt whatever that any publication in which our Saviour is spoken of in the language used in the work which was the subject of this prosecution, is a libel. The direction of

† Repealed S. L. R. Act, 1873.

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TON.

the LORD CHIEF JUSTICE was therefore right in point of law ; and there is no ground for a new trial.

BEST, J. :

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My LORD CHIEF JUSTICE reports to us, that he told the jury that it was an indictable offence to speak of Jesus Christ in the manner that he is spoken of in the publication for which this defendant is indicted. It cannot admit of the least doubt that this direction was correct. The 53 Geo. III. c. 160, has made no alteration in the common law relative to libel. If, previous to the passing of that statute, it would have been a libel to deny, in any printed work, the divinity of the second person in the Trinity, the same publication would be a libel now. The 53 Geo. III. c. 160, as its title expresses, *is an Act to relieve persons who impugn the doctrine of the Trinity from certain penalties. If we look at the body of the Act to see from what penalties such persons are relieved, we find that they are the penalties from which the 1 W. & M. sess. 1, c. 18, exempted all Protestant dissenters, except such as denied the Trinity, and the penalties or disabilities which the 9 & 10 Will. III. c. 35, imposed on those who denied the Trinity. The 1 W. & M. sess. 1, c. 18, is, as it has been usually called, an Act of Toleration, or one which allows dissenters to worship God in the mode that is agreeable to their religious opinions, and exempts them from punishment for non-attendance at the established church, and non-conformity to its rights. The Legislature, in passing that Act, only thought of easing the consciences of dissenters, and not of allowing them to attempt to weaken the faith of the members of the church. The 9 & 10 Will. III. c. 35, was to give security to the Government, by rendering men incapable of office who entertained opinions hostile to the established religion. The only penalty imposed by that statute is exclusion from office ; and that penalty is incurred by any manifestations of the dangerous opinion, without proof of intention in the person entertaining it either to induce others to be of that opinion, or in any manner to disturb persons of a different persuasion. This statute rested on the principle of the test laws, and did not interfere with the common law relative to blasphemous

libels. It is not necessary for me to say, whether it be libellous to argue from the Scriptures against the divinity of Christ; that is not what the defendant professes to do. He argues against the divinity of Christ, by denying the truth of the Scriptures. A work containing such arguments, published maliciously (which the jury in this case have *found) is by the common law a libel; and the Legislature has never altered this law, nor can it ever do so whilst the Christian religion is considered to be the basis of that law.

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Rule refused.

FOWLE, EXECUTOR OF WOODMAN, &C. v. WELSH.

1822.
Nov. 15.

(1 Barn. & Cress. 29—37; S. C. 2 Dowl. & Ry. 133; 1 L. J. K. B. 17.)

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Covenant to save harmless certain premises against all actions, suits, claims, and demands whatsoever, both in law and equity, which might be made, commenced, or prosecuted by H. W. P., or T. B. W. P. Breaches, 1st, That H. W. P. on, &c. at, &c. who then and there made a claim and demand, and claimed to have a right and title to the premises, entered and cut trees, &c. and procured the occupier to attorn to him. 2ndly, That certain title-deeds relating to the premises were withheld by one A. W. at the instance, and through the claim and demand of T. B. W. P. Plea to 1st breach, that H. W. P. had no lawful claim or title to the premises; to 2d breach, similar plea as to T. B. W. P. Demurrer and joinder: Held, first, that H. W. P. and T. B. W. P. being named in the covenant, the indemnity extended to all claims made by them, whether upon lawful title or otherwise; and, secondly, that the acts upon which the breaches were assigned were claims in law within the meaning of the covenant.

COVENANT. The plaintiff declared, that, by a deed-poll of the 12th September, made in the lifetime of W. Woodman, plaintiff's testator, (reciting, amongst other things, that, in 1811, T. B. White Parsons, in consideration of 2,800*l.*, by lease and release, granted, &c. to Aaron Blandford, in fee, certain premises therein described; and that the said Aaron Blandford having occasion for 2,000*l.*, had borrowed that sum of the said W. Woodman, and, for securing repayment thereof, had, by lease and release, bearing date 10th and 11th September, 1812, granted, &c. the said premises to the said W. Woodman, his heirs and assigns, subject to a proviso for

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redemption :) "the said Aaron Blandford and the said defendant, for better securing the repayment of the said sum of 2,000*l.* to the said W. Woodman, his executors, &c. did severally covenant, promise, and agree, *to and with the said W. Woodman, his heirs, executors, &c. that for so long time as the said W. Woodman, his executors, &c. should continue the said sum of 2,000*l.* out at interest on the said premises, they the said Aaron Blandford and the said defendant, their heirs, &c. and each of them, should and would save harmless and keep indemnified the said W. Woodman, his heirs, executors, &c. and also the said premises, of, from, and against all actions, suits, claims, and demands whatsoever, both in law and equity, which should or might be had, made, commenced, or prosecuted, by T. W. Parsons, H. W. Parsons, or T. B. W. Parsons, and of and from all costs, charges, and expenses which the said W. Woodman, his heirs, executors, &c. should sustain, by reason of such actions, suits, claims, and demands, or otherwise howsoever." The declaration then averred, that the said W. Woodman, in his lifetime, and the said plaintiff executor as aforesaid, since the death of W. W., had, ever since the making of the said deed-poll, continued, and plaintiff still did continue, the said sum of 2,000*l.* out at interest, upon the said premises. It then averred general performance by W. W. and the plaintiff, and assigned as a breach, that defendant did not save harmless the said W. W. in his lifetime, and the said plaintiff, executor, &c. since the death of W. W. from and against all actions, &c. (in the words of the covenant); but on the contrary thereof, on, &c. at, &c. the said H. W. Parsons, who then and there made a claim and demand, and claimed to have a right and title of, in, to, and upon the said premises, entered into and upon the same, and cut down grass, trees, &c.; and afterwards, to wit, on, &c. at, &c. caused and procured, and suffered and permitted *one Henry Beaton, who then and there held and enjoyed the said premises, to attorn to him the said H. W. Parsons, and to withhold the payment of the rents, issues, and profits of the same from the said W. W., in his lifetime, and the said plaintiff, executor as aforesaid, since the death of the said W. W.; whereby plaintiff was obliged to bring

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an action for the recovery of the said rents, &c. and incurred great charges and expenses, &c. by reason and means of the said claim and demand of the said H. W. Parsons. Second breach, that, after the making of the deed-poll, and whilst the sum of 2,000*l.* continued out on mortgage, certain indentures of lease and release, and other deeds, papers, and writings, being the title-deeds of and relating to the said premises, were kept, retained, and withholden by one Ann Welsh, at the instance and through the means, and by and through the claim and demand of the said T. B. W. Parsons, in the said deed-poll mentioned; whereby the plaintiff was obliged to commence an action for the recovery of the said title-deeds, and was put to great charges, which said several charges and expenses were sustained by reason and means of the said claims and demands in the said deed-poll mentioned. Defendant pleaded, to the first breach, that H. W. Parsons had not, at the time of the making of the supposed deed-poll, or at any time afterwards, until or at the time of the exhibiting of the bill of the said plaintiff, any lawful right, title, claim, or demand whatsoever, of, in, to, or out of the said premises. To the second breach, a similar plea, that T. B. W. Parsons had not any lawful right, &c. Special demurrer and joinder.

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Littledale, in support of the demurrer :

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The first question arising upon these pleadings is, whether this covenant, being special against the acts of particular persons, extends to all their acts, whether rightful or otherwise.

(ABBOTT, Ch. J.: In *Nash v. Palmer*† it was expressly determined that such a covenant extends to all acts by *droit ou tort*.)

The same conclusion is also warranted by a variety of former decisions: *Foster v. Mapes*,‡ *Tisdale v. Essex*,§ *Perry v. Edwards*,|| *Southgate v. Chaplin*,¶ *Lloyd v. Tomkies*.†† It is therefore clear, that the expression “all claims in law,” used in this instrument, means something more than all lawful

† 17 B. R. 364 (5 M. & S. 374).

|| 1 Str. 400.

‡ Cro. Eliz. 212. S. C. Ow. 100.

¶ Com. 230. S. C. 10 Mod. 384.

§ Hob. 34.

†† 1 T. R. 671

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claims. Then the only question is, whether the acts which are alleged to have been done by H. W. Parsons and T. B. W. Parsons, amount to claims in law. The first breach alleges that H. W. Parsons entered and cut trees, &c. Now entry is one legal mode of making a claim; the entry by H. W. Parsons may therefore be considered as a claim in law. Then, secondly, it is stated in the same breach, that he procured the tenant to attorn. If, instead of that, he had brought an ejectment, or an action for the rent, that would have been a claim in law to be acknowledged as landlord, but by the attornment he obtained the same acknowledgment; that, therefore, was a claim in law within the meaning of this covenant. The second breach alleges that the title-deeds were withheld, at the instance and through the claim and demand of T. B. W. Parsons, and that the plaintiff was obliged to bring an action for the recovery of them. Now, those *deeds being the muniments of the estate, the procuring them to be withheld, as stated in this breach, was in fact a claim in law to the estate itself. The declaration then is good, and the pleas, that H. W. Parsons and T. B. W. Parsons had not lawful title, are bad, according to *Nash v. Palmer*. The plaintiff is, therefore, entitled to judgment.

R. Bayly, contra :

Admitting the pleas to be bad, the defendant is still entitled to judgment; for the declaration cannot be supported. In all the cases which have been cited, the covenant was against acts and not against claims; this case is, therefore, distinguishable from them all. Admitting that, according to *Nash v. Palmer*, the covenant extends to unlawful as well as lawful claims, still the nature of those claims must be ascertained by the other words with which "claims" is associated. The covenant runs thus, "all actions, suits, claims and demands, both in law and equity." Now "claims in law or equity," must mean claims brought in a court of law or equity, although they need not be such as are capable of being enforced. Besides, the first breach does not state that the claim made, was a claim in law or equity; nor does it appear to have been so, for breaking and entering a close and cutting down trees, and procuring an attornment without

any right, are mere tortious acts, and not a claim; so also, causing title-deeds to be withheld, as T. B. W. Parsons is, by the second breach, alleged to have done, is certainly a wrongful act, but cannot be considered as a claim in law or equity to the estate.

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ABBOTT, Ch. J.:

Upon the authority of the case of *Nash v. Palmer*, which is in truth only a confirmation *of many prior decisions, I am of opinion, that this covenant is not confined to lawful claims in law or equity, but extends to all claims, whether lawful or unlawful, made by the persons particularly named in the deed-poll. Then the next question is, whether it sufficiently appears, on the face of the declaration, that the acts alleged to have been done were claims in law or equity. It is impossible to say that the words "claims and demands" are synonymous with "actions and suits," for if so, we should give no effect to the former words, which are well known to the law, and constantly used in releases and other instruments, to denote something more than actions or suits. The first breach does not merely allege that H. W. Parsons entered upon the premises, and did certain acts there, but that H. W. Parsons, "who made a claim and demand, and claimed to have a right and title to the premises," entered. Now entry by a person claiming to have a right, is one legal mode of asserting that right. The breach then states, that H. W. Parsons procured an attornment to himself by the occupier of the land; that, also, is another legal mode of pursuing a claim, and may, therefore, be considered as a claim in law. Then the second breach alleges, that the title-deeds were withheld by A. Walsh, at the instance and by and through the claim and demand of T. B. W. Parsons, one of the persons against whose claims the defendant covenanted to indemnify W. W. and his executors, &c. The withholding of the title-deeds by A. Walsh, at the instance of T. B. W. Parsons, is the same thing in point of legal effect as if they had been withheld by the latter himself; and that act, if done by him, would have been in the nature of a claim or assertion of right to the estate. *The breaches might perhaps have been better assigned; but, as the

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defendant has pleaded over, instead of demurring specially to the declaration, I think that the informality, if any, is thereby cured, and that the plaintiff is entitled to the judgment of the Court, the pleas being undoubtedly bad.

BAYLEY, J. :

I am of the same opinion. H. W. Parsons and T. B. W. Parsons being specifically named in the deed, the indemnity extends to all claims in law or equity, made by them, whether lawful or not. It has been argued, however, that it does not extend to such claims as are set out in the breaches assigned. The defendant cannot avail himself of that objection, unless he shews very clearly what was the meaning of the covenant; for it is a general rule of construction, that ambiguous words are to be taken most strongly against the covenantor. The words here used are, that defendant "would save harmless W. Woodman, his executors, &c. from and against all actions, suits, claims, and demands, both in law and equity, which should or might be made by J. W. Parsons, H. W. Parsons, or T. B. W. Parsons," and the first breach alleges, that H. W. Parsons, "who then and there made a claim and demand, and claimed to have a right and title to the premises," entered and did certain acts, which is equivalent to saying that he, claiming to have a right and title, did, in assertion of the same, enter and do those acts. Now entry is one legal mode of asserting a right, and, therefore, comes within the meaning of the covenant, as a claim in law; and if this were insufficient, the same breach further alleges, that H. W. Parsons procured the tenant in possession to attorn; now attornment makes the person in possession tenant under him to whom the attornment is *made, and therefore, by that act, H. W. Parsons procured a recognition of himself as landlord; whence it must be inferred that he claimed a legal title to the premises. The second breach alleges, that the title-deeds were withheld, at the instance of T. B. W. Parsons, and through his claim to the possession of them; the effect of that is more doubtful, but I think it may be considered as an act done under a claim to the estate. Perhaps this breach might have been bad upon special demurrer; but the defendant, by pleading over, has waived objections of form. The

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pleas are admitted to be no answer to the declaration. Judgment must, therefore, be entered for the plaintiff.

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HOLROYD, J. :

I am of opinion that these breaches are well assigned. The objection taken by the defendant's counsel would, if suffered to prevail, extend to a rightful entry or claim, if not followed up by an action or suit, as well as to an entry made under an unfounded claim; but an entry is a legal mode of claiming or asserting a right; and if an entry had been made by any person having a right, that would certainly have come within the meaning of this covenant as a claim in law. Now the case of *Nash v. Palmer*, and the older authorities which have been cited, shew that claims made by right and those made by wrong, fall under the same legal operation of the covenant upon which this action is founded. If, therefore, a rightful entry by H. W. Parsons would have been within the meaning of the words "claim in law," his wrongful entry must be so likewise. The first breach, however, is not confined to the allegation that H. W. Parsons, who claimed to have title, entered, &c.; it goes further, and states that H. W. P. procured an *attornment. Now the effect of that is the same as if the tenant had permitted him to enter and take possession of the premises, and had then received back the possession, and acknowledged him as the landlord. The very act of obtaining such an acknowledgment from the tenant was, in law, making a claim of title to the premises. As to the second breach, no person is entitled to title-deeds but in respect of the estate of which they are the muniments. Whatever rights others may have arising out of the estate, he only who is entitled to the estate itself is entitled to the deeds relating to it. I therefore agree with the rest of the Court, that our judgment must be for the plaintiff.

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Judgment for the plaintiff.†

† Best, J. was in the Bail Court.

1822.
Nov. 15.
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COX, GENTLEMAN, ONE, &c. v. COLERIDGE, Esq.
AND ANOTHER.

(1 Barn. & Cress. 37—55 ; S. C. 2 Dowl. & Ry. 86.)

A prisoner, when examined before magistrates under a charge of felony, is not entitled, as of right, to have a person skilled in the law present as an advocate on his behalf, it being a preliminary investigation only, and not conclusive upon him.

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TRESPASS for assaulting plaintiff, and seizing and laying hold of him, and forcing him to go out of a certain room in a certain inn in Ottery St. Mary, in the county of Devon, whereby he was hurt and prevented from performing and transacting his necessary business there. There was also a count for a common assault. Plea 1st, not guilty, on which issue was joined ; 2ndly, a justification that defendants were, and are two of the justices of the King for the county of Devon ; and that so being such justices at the time when, &c. they were assembled in the said room within the said county, *and within their jurisdiction, to take the information upon oath of the prosecutor, and the several witnesses touching and concerning a certain felony, before then charged to have been committed by one G. B. within the said county, and within their jurisdiction, and upon which charge the said G. B. was then in custody before them, and to examine the said G. B., being the party accused, touching the same, and further to do and perform there such things as should to them seem proper as such justices. And that defendants being so assembled in the said room, as such justices, and for the purposes aforesaid, the plaintiff afterwards, and before the time when, &c. not having been summoned before them as a witness touching the matter then in examination, nor being charged as a party concerned in the same, nor coming before them to testify any knowledge concerning the same, with force and arms wrongfully broke and entered into the said room, and intruded himself upon the defendants so assembled therein as aforesaid, and for the purpose aforesaid. The plea then averred a request by the defendants to the plaintiff to leave the room, and that the plaintiff refused to obey it, and continued there in contempt of the defendants, as such justices, and to the dis-

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turbance and violation of due order and decency in the administration of justice, and to the hindrance thereof; whereupon the defendants gently laid their hands upon him, &c. There was a second justification, that defendants were lawfully possessed by the consent of the master of the inn of the said room; and that they were there employed in their lawful purposes; and that plaintiff violently and unlawfully broke and entered the same, &c. whereupon, &c. The plaintiff in his replication to the first justification *stated, that before and at the time when, &c. he was, and is one of the attorneys of the King's Bench, and well skilled in the laws, statutes, and customs of this realm; and that the said G. B., before the supposed breaking, entry, and intrusion in the plea mentioned, to wit, on, &c. had been, and was apprehended, and in custody under a warrant of defendants, as such justices, and was about to be examined by defendants, as such justices, touching the same, to wit, at, &c.; whereupon the said G. B. then and there stated and informed the said defendants, so being such justices, that, upon the examination of certain witnesses, the entire innocence of the said G. B., in the premises, would appear to the defendants as such justices. And that defendants, as such justices, did thereupon discharge the said G. B. out of custody, and permit and suffer him to go at large, for the purpose of enabling him to bring such witnesses to be examined by and before the said defendants, as such justices, at a time prefixed by defendants to the said G. B. in that behalf, touching the felony aforesaid. And that afterwards, and a little before the time so prefixed to the said G. B., and a little before the said supposed breaking, &c. in the said plea mentioned, to wit, on, &c. the said G. B., and the said last mentioned witnesses, being about to be examined by and before the said defendants, as such justices, touching the said supposed felony, and the said defendants, as such justices, being then and there about to take such information as in the said plea mentioned; he, the said G. B., being an illiterate person and unskilled in the laws and customs of this realm, applied to, and requested and retained the said plaintiff, as such attorney so skilled as aforesaid, to accompany *him, the said G. B., before the said defendants as such justices; and to assist him, the said G. B.,

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with his, the said plaintiff's counsel, skill, suggestions, and advice, in making his, the said G. B.'s defence before them, the said defendants, as such justices, to the said charge; and in clearing himself therefrom, and shewing his, the said G. B.'s innocence in the premises, and in examining the said prosecutor and witnesses in the said plea mentioned, and the said witnesses in this replication first above mentioned, being witnesses then and there adduced, and brought by and for the said G. B. in that behalf, to be examined by and before the said defendants as such justices, touching the said supposed felony, the said last mentioned witnesses being then and there capable of deposing to and establishing certain facts, from which would appear to the said defendants, as such justices, the entire innocence of the said G. B. in the premises; and that there existed no grounds whatever for suspecting the said G. B. to have been guilty of the said supposed felony, or in any way conusant of or implicated in the same. And further to assist and advise him, the said G. B., in the premises, as far as he, the said plaintiff, was by the laws, statutes, and customs of this realm, authorised, enabled, and empowered to do, to wit, at, &c. Whereupon the said plaintiff, having thereupon as such attorney, so skilled as aforesaid, then and there acceded to the said request, and accepted the said retainer for the said G. B., did, as such attorney so skilled as aforesaid, a little before the said time when, &c. for and on the behalf of the said G. B., and at his request, and upon his retainer as aforesaid, accompany the said G. B. before defendants, as such justices as aforesaid; and in so doing, did necessarily *enter into the said room in which, &c. for the purpose of assisting and advising the said G. B. touching the premises as aforesaid; and did thereupon then and there inform, and give notice to the said defendants, as such justices as aforesaid, that he, the said plaintiff, then was such attorney so skilled as aforesaid; and that he, the said plaintiff, had been, and was so applied to, requested and retained as aforesaid; and that he, the said plaintiff, had then and there entered the said room for the purpose aforesaid, and continued therein from thence, until the said defendants afterwards, to wit, at the same time when, &c. of their own wrong, committed the said several trespasses, &c.

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There was a similar replication as to the second justification.
Demurrer and joinder.

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Coleridge, in support of the demurrer :

The replications cannot be supported, unless the plaintiff can establish that an attorney has the right to attend at an examination of this description, on behalf of a party accused of felony. Now there is no authority which can be produced in support of such a claim ; and the only cases bearing on the subject, seem to authorise the opposite conclusion. In *Rex v. Justices of Staffordshire*,† there is an opinion thrown out incidentally by BAYLEY, J. that even in the case of a summary conviction under the game laws, an attorney has no right to be present. That is a much stronger case than this, for there the magistrate acts judicially ; but here, he is only making a preliminary enquiry, for the purpose of ascertaining whether there is sufficient ground to commit *a party for trial. And the case of *Rex v. Borron* ‡ is to the same effect. The first statute relative to this subject, is 1 Ric. III. c. 3,§ by which power was given to one justice to bail persons arrested for suspicion of felony. Then came 3 Hen. VII. c. 3,§ which confined that power to two justices, one of whom was to be of the quorum. These were followed by the 1 & 2 Ph. & M. c. 13,§ which required both justices to be present together at the time of bailing the prisoner ; and in the 4th section, directed the magistrates, previously to their taking bail, to take the examination of the prisoner, and the information of them that bring him. And this was afterwards extended by 2 & 3 Ph. & M. c. 10,§ to the cases of commitments. Now in all these statutes the Legislature seems to have contemplated one agent only in this preliminary examination, viz. the magistrate, and do not appear to have considered it as at all analogous to a trial in which both sides were to be heard. The proceeding is, in these cases, *ex parte* only, and the presence of an attorney for the prisoner cannot, therefore, be necessary. In Dalton's Justice (c. 164, p. 407) the law on this subject is laid down very strongly, and shews how little discretion a magistrate has in enquiries of

[*42]

† 1 Chitty, 218.

‡ 22 R. B. 447 (3 B. & Ald. 432).

§ Repealed 7 Geo. IV. c. 64, s. 32.

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this nature. He says, that “ where any felony is committed, and one brought before a justice of peace on suspicion thereof, the justice ought to commit or require bail, though it shall appear to him that the prisoner is not guilty thereof; for it is not fit that a man once arrested and charged with felony, or suspicion thereof, should be delivered, on any man’s discretion, without farther trial.” For this he quotes Crompton, 34, and Lambard, 229. And in page 408, after enumerating persons who are *not to be considered as credible witnesses, he adds, “ But if one be brought before a justice of peace upon suspicion of felony, although the information against the prisoner shall be by such witnesses, yet it seemeth safest for the justice of the peace to take their information for the King, and to bind them over to give evidence, &c. and to commit the party suspected, and upon the trial to inform the justices of gaol delivery concerning their credit.”

(BAYLEY, J.: Those citations, I apprehend, are not law at the present time.)

They are, however, authorities shewing what the law was formerly, and how little discretion was considered as vested in magistrates; and Lord Hale (Pleas of the Crown, vol. ii. p. 121) is nearly to the same effect. He says, “ If a prisoner be brought before a justice, expressly charged with felony by the oath of a party, the justice cannot discharge him, but must bail or commit him; ” and Hawkins (lib. 2, c. 15, s. 1) adopts the opinion of Lord Hale. Nor can the presence of an attorney be requisite, in order to examine witnesses for the prisoner; for it does not appear that the prisoner has any right to examine witnesses in this stage of the case. If the magistrate proceeds under the statute of Ph. & M. he must examine the witnesses on oath. Now at the time when that statute was passed, the witnesses for the prisoner could not have been so examined. It is true, that Lord Coke (3 Inst. 79) is of a different opinion, but the universal practice, previously to the 1 Anne, stat. 2, c. 9, s. 8, shews the contrary; and so was the opinion of Hawkins (lib. 2, c. 46, s. 29). If so, it would seem to follow, that it was not competent for the magistrate to examine witnesses at all for the prisoner, and, consequently, that the presence of an attorney cannot for that

purpose be necessary. And this view of the case *is confirmed by the mode of proceeding before a coroner, who is bound, according to Lord Hale (Hist. P. C. vol. ii. p. 62), to examine witnesses on oath on both sides, and to certify the whole evidence to the justices of gaol delivery. In that case counsel are allowed to be present. But these proceedings are quite distinguishable from the preliminary examinations before magistrates, and are in fact distinguished on this very ground by Lord Hale. † The next ground for the presence of an attorney is supposed to be, that there may be a question as to bailing the prisoner; but that cannot be necessary. In many cases the magistrate has no discretion to bail, and where he has, he is solely responsible, if he demands excessive bail. The present claim, if established as a right, may lead to great inconvenience. How is a magistrate to know whether a man be an attorney or not? The consequence will therefore be, that any person claiming to be an attorney may assume the right of being present. Suppose the prisoner to be one of a *gang, it may afford the means of communication with those not in custody, and enable them to evade justice. There could be no such thing as a secret examination of the witnesses, which, in a preliminary proceeding, is often absolutely necessary. If this claim be allowed, it will be difficult to distinguish from it the cases of

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† In Dalton, chap. clxv. p. 412, it is laid down thus. "It seemeth just and right the justices of peace, who take information against a felon or person suspect of felony, should take and certify as well such information, proof, and evidence, as goeth to the acquittal or clearing of the prisoner, as such as makes for the King and against the prisoner; for such information, evidence, or proof taken, and the certifying thereof by the justice of peace, is only to inform the King and his justices of gaol delivery, &c. of the truth of the matter." "But query" (he subsequently adds,) "if the justices of peace or coroner may take upon oath such information, &c. as maketh

against the King. It seemeth no. Upon trial of felons before the justices of gaol delivery, the said justices will often hear witnesses and evidence which goeth to the acquittal of the prisoner, yet they will not take upon oath, but do leave such testimony and evidence to the jury to give credit, or to think thereof as they shall see and find cause." If this be law, it may possibly be contended that, subsequently to the 1 Anne, st. 2, c. 9, s. 3, the justices of the peace, who before should have heard witnesses in defence of the prisoner, but not upon oath, should now examine those witnesses on oath.

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proceedings before a grand jury. Yet it has never been conceived that a prisoner has a right to be present, either in person or by attorney, in such cases.

Denman, contra :

The question is one of considerable importance, inasmuch as of late years the cases placed under the summary jurisdiction of magistrates have greatly increased. Cases of smuggling, and those under the excise laws and game laws, in which the judgments of magistrates are final, and affect the liberty and property of many individuals, will all follow the same rule; and the consequence will be, that in all of them an ignorant party will be obliged to defend himself often in a nice question of law without having any right to legal advice or assistance. Such a consequence will have a tendency to produce great injustice, and the Court will, therefore, pause before they arrive at it. Here the plaintiff claims, in point of form, a right to be present as an attorney; but that is not the substance of it; he claims really, not in the character of an attorney, but in that of a person skilled in the law, or of an advocate for the party accused. The object is, that the party accused shall have the full benefit of an effective cross-examination of the parties accusing him. This will not affect the right of the magistrates, if they please to have a secret examination of the witnesses, which is obviously a measure of police only, and may *still be done in a previous or subsequent stage of the case. Here the examination is under the statute of Ph. & M.,† and must, by law, be in the presence of the prisoner, and the magistrate acts judicially. The object is to throw as much light as possible on the transaction. Hawkins, in the passage cited, says that the party accused must be either bailed or committed, unless it manifestly appear that no such crime was committed, or that the cause of suspicion was groundless. But how is that to appear, if the only efficient mode of procuring that result be excluded? Suppose the accused be deaf and dumb, or illiterate, as in the case here, or a foreigner; in those cases, is he to be utterly without assistance? As to the passages cited from Dalton, it may be safely admitted that, if

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† 2 & 3 Ph. & M. c. 10, since repealed.

they be law, this demurrer can be supported. But they are clearly not law. The cases, *Rex v. Justices of Staffordshire*, and *Rex v. Borron*, are not applicable. For, in the first, the decision of the Court was only that no criminal information could be granted. But even supposing the magistrates had acted erroneously, they would not be liable to a criminal information: for they must have acted corruptly also to induce the Court to interfere; and the opinion incidentally thrown out by BAYLEY, J. was not at all necessary to the decision. The case of *Rex v. Borron* was also an application for a criminal information. There the claim was for an attorney to be present to make a speech, and conduct a prosecution before a magistrate, which is very different from the present case. The proceeding before a grand jury is quite distinguishable; there the prisoner himself is not allowed to be present; here he is necessarily present, and consequently the law which requires his presence must give *him incidentally the right to such assistance as can alone make his presence useful for the ends of justice. And the proceeding before a grand jury is ordinarily followed either by immediate discharge or trial in open court. In the case of an inquisition before the coroner, a party has a right to attend by counsel, and yet there no particular person is under accusation at the time: *Barclee's* case.† This case is, however, stronger; for here a particular individual is, in the first instance, accused before the magistrate who is to hear the case, and is to decide whether a committal is to take place or not. If so, it is surely essential to justice that the fullest materials should be afforded for his decision, which can only be by giving to the accused, who may be illiterate, the right to be assisted by a person skilled in the law.

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(BAYLEY, J.: Is not the circumstance, that the inquisition may be conclusive upon them as to the flight, the ground on which parties have a right to attend before a coroner by counsel? *Barclee's* case was that of a *felo de se*, and the inquisition was therefore not traversable.)

It is said to be doubtful whether any witnesses can be examined

† 2 Sid. 101.

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for the prisoner, because they could not, at the time of the statute, be examined on oath. But the authority of Lord Coke, in the 3rd Institute, is strong, (and Lord Hale (Hist. Pl. Cr. vol. ii. p. 283) assents to it,) that previously to the statute of Anne there was no known law against the examination of witnesses on oath for the prisoner. The statute may therefore be considered as declaratory of the law in that respect. And even if that be not so, the consequence does not follow; for the attorney is at all events necessary to cross-examine the *witnesses for the prosecution. And this is the more necessary, inasmuch as their depositions, certified by the magistrates, may afterwards, in case of their death or wilful absence, be read in evidence against the prisoner, on the ground that he has had the opportunity for such cross-examination.† In this case, however, it appears on the record, that a day was given to the prisoner by the defendants, in order that he might produce witnesses. The objection cannot therefore be taken here. The claim being in this case founded on the plain principles of justice, it is incumbent on the other side to shew some authority against it. This they have not done, and, consequently, the plaintiff is entitled to the judgment of the Court.

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ABBOTT, Ch. J. :

If I thought that our decision in favour of the defendants would have a tendency to produce any inconvenience to the administration of justice, or to infringe the liberty of the subject, I should certainly pause before I agreed to it; but as I am convinced that it will produce no such effect, and that, on the contrary, in an enlarged view of the subject, it will really prove more beneficial to defendants than the opposite conclusion, I do not think it right to delay giving our opinion respecting this case. The plaintiff, it is clear, cannot be entitled to succeed, unless he can establish the position, that every person accused before a magistrate, whether of felony or misdemeanour, has a right to have some person of skill in the law to attend on his behalf.

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The case cannot be put on the nature *of the plaintiff's character

† See *Rex v. Paine*, 1 Salk. 281; S. C. 5 Mod. 163; 2 Hawk. P. C. lib. 2, c. 46, ss. 3 to 10.

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as an attorney, for it is no part of the proper duty of an attorney to attend in such cases. He must attend only in the character of an advocate. Now, if such a right as this really existed, one would expect to find it recognised in some of our books of authority. It is true that, in practice, magistrates do permit, on many occasions, the presence of advocates for the parties accused. Such a practice is undoubtedly very convenient where doubts arise on matters of law, respecting which the magistrates (who must, however, be considered by the Court as competent to judge in such cases,) may wish to have the benefit of legal assistance. But it does not follow, from the existence of such a practice, that there is any such right as that now claimed. The right, if it existed, might be productive of great inconvenience. It would be difficult to distinguish between the cases of an offence committed by one, and that of one committed by a number of individuals. And yet in the latter case, if an attorney has a right to attend where one out of a gang is examined, he may obtain and convey information to the rest; the effect of which might be to frustrate the justice of the case. Besides, it must follow, that, if the party accused has this right, it cannot be denied to the accuser. The effect of that would be, that great expence and inconvenience would follow, and great prejudice to the prisoner in the majority of cases; as it would be much more likely to happen that a prosecution should be attended by counsel than a defence, and the magistrate would be probably as much influenced, if at all, by an advocate for the one side as the other. The nature of the proceeding also shews that this cannot be properly demanded as a right. What is *it? It is only a preliminary enquiry, whether there be sufficient ground to commit the prisoner for trial. The proceeding before the grand jury is precisely of the same nature, and it would be difficult, if the right exists in the present case, to deny it in that. This being only a preliminary enquiry, and not a trial, makes, in my mind, all the difference. At a trial before a magistrate it may perhaps be different. But to establish the right now claimed would, as it seems to me, be productive of great inconvenience. By adhering to the present practice we shall prevent this. It is far better and safer to leave it to the discretion of the magistrates in each

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particular case, whether they will admit or exclude an advocate for the accused party. I think, therefore, that our judgment should be for the defendants.

BAYLEY, J.:

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This is not the case of a summary conviction, but of an accusation of felony, and the decision of the magistrate is not conclusive. Whenever the former case shall arise, I wish not to be considered as bound by the *obiter dictum* which I am reported to have used in the case cited; I am open to hear that point argued whenever it becomes necessary. This question is, however, quite different; and my present opinion does not go upon any distinction between the character of an attorney and a counsel, for it appears to me that neither the one nor the other has a right to attend in such cases as the present, either on behalf of the prosecution or for the prisoner. As to the passages which have been cited from Dalton, I am by no means satisfied with their authority; for I think that a magistrate is clearly bound, in the exercise of a sound discretion, not to commit any one, unless a *prima facie* case *is made out against him by witnesses entitled to a reasonable degree of credit. It seems to me that it is only a privilege to the accused to be allowed an adviser, and not a right; but it may be very useful for a magistrate to grant it in many cases, and it is to be presumed that he will do so on all proper occasions. Besides, if the party be really innocent, he will himself be able to suggest to the magistrate all such matters as may tend to elucidate the truth. There is an analogy between this case and an enquiry before a grand jury; and if it be hard, as it is argued, that a party accused, who by law is allowed to be present at the enquiry, should be deprived of the assistance of an advocate, in how much worse a situation is he placed before a grand jury, where he is not even allowed to be present himself; and yet, in that case, upon a bill being found, a warrant immediately issues, upon which he may be deprived of his liberty. There is no authority which has been cited in favour of the right now claimed, and the state of the law at the time when the statute of Ph. & M. passed, affords a strong argument against it, for at that period the witnesses for a prisoner

could not be examined upon oath, and the only possible benefit which could at that time be derived from the presence of an advocate for the party accused, would be the cross-examination of the witnesses for the Crown. This, however, is a narrow ground, and I do not rely upon it as a foundation for my opinion, which rests upon the broad ground that this is entirely in the discretion of the magistrate, and cannot be claimed as a right.

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HOLROYD, J. :

I am of the same opinion, that the right claimed cannot legally be supported. A magistrate, *in cases like the present, does not act as a court of justice; he is only an officer deputed by the law to enter into a preliminary enquiry, and the law which casts upon him that jurisdiction, presumes that he will do his duty in enquiring whether the party ought to be committed or not. The claim now set up must be to have any person skilled in the law present at the enquiry; for the plaintiff cannot rely upon his legal character of an attorney. This claim, therefore, must be general; that any person skilled in the law has a right to attend, or it cannot be supported at all. Then, can such a general claim be supported? There is no authority in the books for it, nor is it agreeable to the usual practice in such cases. It certainly may be very convenient and desirable, in many instances where legal doubts arise, that a party should have such assistance, but that alone cannot establish the general right; I think, therefore, that as the magistrate, in cases like the present, only commits the party for the purpose of further answering the charge made, the present claim cannot be supported.

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BEST, J. :

In the case of *The King v. Borron*, this Court declared that an attorney has no right to be present at an enquiry before a magistrate on a charge of felony. This right of an attorney was not the principal point then under our consideration, and I therefore should not feel myself precluded by the authority of that case from again examining the question. I cannot discover any ground on which an attorney can claim a right to attend an examination of this sort, either for the prosecution or the prisoner.

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What authority is there to support such a right? We have been referred to none *and none can be found. It cannot be contended that the common law acknowledges any such right. It is however argued, that the examination of a prisoner by a magistrate, under the statutes of Ph. & M., is a judicial enquiry, and that therefore the prisoner has a right to the assistance of an attorney. But the history of these statutes proves that they were not intended to authorise any such thing. The preamble to the 1 & 2 Ph. & M. c. 13, informs us, that the 3 Hen. VII. c. 5, which had restrained the power given to one magistrate by 1 Ric. III. c. 3, to bail persons accused of felony, had not prevented single magistrates, by sinister means, from setting at large the greatest offenders. This statute, after declaring what offences shall be bailable, and the manner in which the justices shall proceed in admitting them to bail, directs, that before the justices admit to bail, they shall take the examination of the prisoner and the information of them that bring him, and certify them to the justices of gaol delivery. This statute did not, however, require any examination to be taken where the prisoner was committed. I think, therefore, that the principal, if not the only object of the Legislature, in passing this law, was to require information to be given to the justices of gaol delivery of the cases in which the magistrates had admitted prisoners to bail, and was not to institute a judicial enquiry. The information thus obtained was found useful on the trials of prisoners, and, therefore, the 2 & 3 of Ph. & M. c. 10, extended the provisions of the former Act to the cases where the prisoner was committed; and the only object, as it seems to me, was to give assistance to the Judge before whom the prisoners were to be tried; and so far was this examination from being a judicial enquiry, *which means an enquiry in order to decide on the guilt or innocence of the prisoner, that, as the law was administered a few years after the passing these statutes, the justices, even where it appeared that a prisoner was not guilty, were not to discharge him without bail: Dalton, c. 164. The modern practice is, indeed, different, and is more consistent with law and humanity; and I refer to Dalton, only to shew that it could not then have been the opinion of the profession that this examination was any thing like a judicial enquiry. It

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has been argued that a prisoner under examination should have the assistance of an attorney, to cross-examine the witnesses for the Crown, the depositions taken being, in certain cases, evidence against him, on account of his having had an opportunity for cross-examination. But this does not mean cross-examining by counsel or attorney, for that formerly was not allowed to a prisoner, even on his trial.† Besides, if this right exists, there can never be any private examinations, which are very frequent, and often very necessary for the purposes of justice. They are useful, not merely to take down in writing such evidence as is to be offered at the trial, but to find where further evidence may be obtained, and to get at accomplices. These objects would be defeated if any one had a right to be present who could convey intelligence of what had passed. It may be said, that as the prisoner must be himself present, he may communicate with his accomplices; but the magistrates, whilst he is under commitment for further examination, may lawfully prevent him from giving intelligence to his companions. It may be extremely hard that an innocent *person should be confined for an hour, when, if he were allowed professional assistance and witnesses, he could demonstrate his innocence, and entitle himself to his discharge. But there is no rule, however wise, that does not produce some inconvenience or hardship, and the question always must be, does the good outweigh the evil. Considering how many desperate offenders might escape justice, and proceed uninterrupted in their guilty career, if this right were allowed, I have no hesitation in saying that it ought not to be admitted, and that we ought to give judgment for the defendants.

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Judgment for the defendants.

† Hawkins, lib. 2, c. 39, s. 1.

1822.
Nov. 18.

WOOLLEY, EXECUTRIX, &c. v. KELLY AND
OTHERS.†

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(1 Barn. & Cress. 68—70; S. C. nom. *Woolley v. Clark*, 2 Dowl. & Ry. 158;
1 L. J. K. B. 38.)

In an action against several defendants a verdict was taken for the plaintiff for 400*l.* damages, subject to a point of law, reserved for the opinion of the Court; and in case that point should be determined in favour of the plaintiff, then subject to the award of a barrister as to the damages. The point of law having been decided in favour of the plaintiff, the arbitrator, having been consulted by one of the parties in the cause, declined proceeding in the reference. One of the defendants refused to name any other arbitrator. Under these circumstances the Court ordered judgment and execution to issue against that defendant for the damages found by the jury, unless he would consent to refer the damages to some other arbitrator.

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A RULE *nisi* had been obtained, calling on the defendant, Kelly, to shew cause why the plaintiffs should not be at liberty to issue execution against him for the value of the goods for which this action was brought, or why the arbitrator named in the order of reference in this cause, should not be at liberty to name another arbitrator. It appeared by the affidavits, that in December, 1821, a verdict was found for the plaintiff for *400*l.*, liberty being reserved to the defendants to move to enter a nonsuit, and in case the Court should think that the defendants had no ground for the application, then it was to be referred to a barrister to ascertain the amount of the damages. A rule for entering a non-suit was obtained, but afterwards discharged.‡ The parties attended the arbitrator on the 21st of June, when, on its being suggested that the arbitrator had been consulted as counsel in the cause, he declined proceeding with the reference. The defendant, Kelly, having refused to name another arbitrator, the plaintiff, in this Term, obtained the above rule, against which—

Archbold now shewed cause, and contended that the Court had no power to compel the defendant, Kelly, to name another arbitrator; that it was contrary to justice that execution

† Followed in *Taylor v. Gregory*
(1831) 2 B. & Ad. 774.—B. C.

‡ See 24 R. B. 546 (5 B. & Ald.
744; 1 Dowl. & Ry. 409).

should issue for the sum for which the verdict was taken, no inquiry having taken place as to the value of the goods. The consequence, therefore, must be, that the case must go down to another trial, when the defendant expected, by other evidence, so to alter the facts proved at the former trial, as to obtain a verdict.

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Per CURIAM:

Where a verdict is taken for the plaintiff, with damages, judgment and execution follow of course, unless some special cause be shewn to the contrary. Where the verdict is taken, subject to a reference, the Court will, upon the application of the defendant, prevent the plaintiff from entering up judgment, or issuing execution. It lies, however, upon the *defendant to shew to the Court some sufficient reason why judgment and execution should not follow the verdict. Does the defendant, Kelly, in this case, shew any such sufficient cause? He agreed at the trial to refer the quantum of damage to a barrister, who, from motives of delicacy, refused to act as referee. The defendant then refuses to name any other arbitrator, and wishes to make the breach of his agreement to refer a ground for staying judgment and execution; but that certainly is not a sufficient ground; and therefore, unless the defendant consent to refer the quantum of damages to some other barrister, let judgment be entered up, and execution issue for the damages awarded by the jury.

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The defendant then consented that the question of damages should be referred to another arbitrator.

Rule accordingly.

1822.
Nov. 19.

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ELLIS v. ARNISON.

(1 Barn. & Cress. 70—74; S. C. 2 Dowl. & Ry. 161; 1 L. J. K. B. 24.)

By an Inclosure Act it was enacted that the allotments in lieu of tithes should be inclosed and fenced on all such parts and sides as should not be directed to be fenced by any other proprietor, or as should not adjoin to any inclosed lands, or be bounded by any river or other sufficient fence in the judgment of the commissioners. A ditch, which had been immemorially the only boundary between the common and adjoining townships, is a fence within the meaning of the Act.

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BESIDES the issues in law in this case, upon which judgment was given upon demurrer (5 B. & Ald. 47), there were two issues in fact, one of which was, whether the allotment made to the plaintiff was enclosed and fenced, according to the Act of Parliament, in the manner therein prescribed, in such parts thereof as were not directed to be fenced by any other proprietor, or as did not adjoin any inclosed lands, or as were not bounded by a river, or some other sufficient fence, in the judgment of the said commissioners. The following *was the clause of the Act in question: "And be it further enacted, that the several allotments which shall be made to the said B. Lord Hotham and Sir G. H. F. Berkeley, and S. Doyley, as impropiators as aforesaid, and to the said W. Ellis, or his successors, for or in respect of any messuages or glebe lands belonging to the said church of the said parish of East Moulsey, and in lieu of tithes within the said parish, shall be inclosed and fenced on all such parts and sides as shall not be directed to be fenced by any other proprietor, or as shall not adjoin to any inclosed lands, or be bounded by any river, or other sufficient fence, in the judgment of the said commissioners, with good thriving quicksets, guarded on both sides in a substantial and proper manner, with proper ditches, and good and substantial stiles and carriage-gates where necessary for the convenient occupation thereof; and the whole costs and expenses of making and keeping such fences, stiles, and gates in good repair for seven years, shall be deemed and considered as part of the expenses of carrying this Act into execution, and shall be borne and defrayed accordingly, by the persons whose lands and grounds in the said several parishes shall be discharged from tithes by virtue of this Act, in such

parts and proportions as the said commissioners shall order and direct; and such fences shall, after the expiration of the said term of seven years, be maintained and kept in repair by such person or persons as the said commissioners shall, in and by their said award, order and direct." At the trial of the cause before Abbott, Ch. J., at the Middlesex sittings after last Hilary Term, it appeared that in one part of the allotment made to the plaintiff, the only fence was an old deep ditch or drain, which had been immemorially the only boundary in that part between the *commons and the two adjoining townships. There was no hedge or rail, or any thing else protecting the ditch; but it was sworn, by the surveyor to the commissioners, that, in the judgment of the commissioners, the ditch alone, in its then state, was a sufficient fence. The LORD CHIEF JUSTICE was of opinion, that this Act of Parliament must be construed with reference to the provisions of the general Inclosure Act, 41 Geo. III. c. 109, and that if so construed, a mere ditch could not be a fence within the meaning of the Act; and sections 25, 26, and 27 were particularly referred to. He accordingly directed the jury to find a verdict for the plaintiff on that issue, but reserved liberty to the defendant's counsel to move to enter a verdict for the defendant upon that issue, if the Court should be of opinion that a ditch could be considered to be a fence within the meaning of the Act. *D. F. Jones* obtained a rule *nisi* in Easter Term, in pursuance of the leave reserved, and contended, that the jury having found that the ditch was in fact a sufficient fence, in the judgment of the commissioners, the only question was, whether, in point of law a ditch could be a fence within the meaning of this particular Act of Parliament. It is true that the general Inclosure Act, 41 Geo. III. c. 109 (U. K.) contains certain provisions as to hedges, posts, and rails, &c. but it does not say that nothing shall be considered as a fence, save a hedge, or a regular protection by posts and rails; on the contrary, the 27th section of the general Act speaks of inclosures being "fenced by a mound, brook, or rivulet." The strict definition of the term "fence" means nothing more than a sufficient guard to fend or keep off, or shut out. The clause in question in this particular Act speaks expressly of a "river or other *sufficient fence." The

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ditch in question has been immemorially the only fence, in this sense of the word, between the adjoining commons, and also between the adjoining townships, as far as living memory goes. In Lincolnshire ditches are very common fences.

The *Solicitor-General* and *J. Parke* now shewed cause :

A fence within the meaning of this Act of Parliament must be taken to be some better protection than a mere ditch. The sides of the ditch may fall in, or be trodden by cattle, so as very shortly to be no barrier. Some guard elevated above the surface of the ground should at least be required.

(BEST, J. : Callis, in his "Reading on Sewers," p. 63, mentions ditches as one of the several matters of defence which the Statute of Sewers maintaineth ; and in p. 81, he speaks of ditches, among the anciently acknowledged fences, dividing lordships, &c. ; and refers to a case in the Year Books, 12 Hen. IV. 7, against the master of St. Marks, in Bristol, respecting an ancient ditch there ; and he instances Fosdike, an old ditch in the north-east part of the city of York ; Caredike, in Lincolnshire ; the Devil's dike, on Newmarket-heath, and Wansdike, in Wiltshire, which in some parts divides two counties.)

This Act of Parliament must be construed with reference to the general Inclosure Act, and by that Act it appears, that the Legislature considered either a mound or a hedge, or at least posts and rails, to be necessary for an effectual fence. The instances put by Callis are of certain ancient and very considerable ditches, and it is too much to infer, from the mention of these particular instances, that any ditch may be a fence. As to the words of the local Act, which have been relied *on, "river, or other sufficient fence," by that must be meant a river, or some other fence, *ejusdem generis*.

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D. F. Jones, in support of the rule, was stopped by the COURT.

Per CURIAM :

Whatever provisions the general Inclosure Act may have very

wisely introduced, yet we cannot say that a ditch may not be in legal construction a fence; and if it may be, then the jury in this case have found that this ditch was a sufficient fence, in the judgment of the commissioners. The verdict must, therefore, be entered for the defendant on this issue.

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Rule absolute.

LEE v. SHORE AND OTHERS.

(1 Barn. & Cress. 94—99; S. C. 2 Dowl. & Ry. 198; 1 L. J. K. B. 48.)

1822.
Nov. 25.

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Where a plaintiff in an action for goods sold and delivered, proved the possession of the goods by himself, and their removal by the defendants; and it appeared that the goods consisted of spar lying on the lands of A., and that the plaintiff claimed under A. by a written agreement not produced: Held, that this was not sufficient proof of title to the goods, from which a contract between the parties could be implied.

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial before Best, J. at the last Spring Assizes for Derbyshire, it appeared that the action was brought to recover the value of a quantity of spar, taken and used by the defendants, and which the plaintiff alleged to be his property. Spar is part of the refuse dug from lead-mines, together with the ore, and after being separated from it, is thrown upon the land adjoining the mine. The land, whence the spar in question was taken, had been for more than 20 years occupied by one Bond, as tenant from year to year under W. Hurd; at the time of the letting to him, a lead-mine in the farm was specially reserved, but the spar was not mentioned. In 1814, the plaintiff applied to Hurd for a lease of the spar from time to time thrown upon the land occupied by Bond, and an agreement respecting it was made between them, by letters, which were afterwards stamped, but were not produced. *The plaintiff then proved, that he had sold the spar to several persons who carried it away from the land, without any interference by Bond; but no contract was proved to have been made between the plaintiff and defendants. For the latter it was objected, 1st, That the plaintiff had not proved that the spar was ever let to him; and, 2ndly, That no

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evidence had been given to show that Hurd had power to let the spar to the plaintiff, that being a part of the land which was let to Bond. The learned Judge thought the objections valid, and was about to nonsuit the plaintiff, but at the request of his counsel left the case to the jury, and desired them to say, 1st, whether the plaintiff had proved any title to the spar; and, 2ndly, whether Bond, the tenant of the land, had relinquished his right to it, if he ever had any. The jury found a general verdict for the defendants. In Easter Term, *Clarke* obtained a rule to shew cause why the verdict should not be set aside and a new trial had: and now,

Denman (with whom was *N. Clarke*) shewed cause:

No evidence was given at the trial to prove the plaintiff's title to the spar. The only legitimate evidence for that purpose was the stamped agreement entered into between him and Hurd, and that was not produced. Neither was it shown that any contract, for the sale of the spar, had been made between the plaintiff and defendants. The plaintiff, therefore, could not be entitled to a verdict. Besides, no person but the tenant of the land could give the defendants leave to enter upon it; and therefore, even if the plaintiff had shewn the agreement made between him and Hurd, he *could not have conferred upon the defendants a complete title to the spar, for Bond might at any time have prevented them from carrying it away. Perhaps, indeed, the plaintiff should have been nonsuited, but as the case was left to the jury at his own election, he cannot now complain.

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Clarke and Reader, contra:

Although the agreement between Hurd and the plaintiff was not produced, still possession was proved in the latter, and various acts of ownership exercised by him, which made out a *primâ facie* title to the spar. As to the objection that Bond might have interfered and prevented the defendants from taking away the spar, it is a sufficient answer, that he did not do so; they are therefore bound to pay for that which they took. Suppose a landlord were to enter upon his tenant, cut down a tree and sell it; the pur-

chaser having carried away the tree, must pay the price of it, although liable to be sued as a trespasser by the tenant. The plaintiff then, having proved a *primâ facie* title to the spar, and that the defendants took it, was entitled to a verdict. Whether or not the tenant of the land had relinquished his right to the spar, if he ever had any, was a question for the Judge, and ought not to have been left to the jury.

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ABBOTT, Ch. J. :

This was an action for goods sold and delivered, which is founded on contract. Now here there was no express contract, and the question is, whether any can be inferred. The only evidence from which we are called upon to draw such an inference, is a *primâ facie* case of possession by the plaintiff, *and the removal of the spar by the defendants. But where the owner of property which has been taken away by another, waives the tort, and elects to bring an action of assumpsit for the value, it is incumbent upon him to shew a clear and indisputable title to that property. Did the plaintiff do that in the present case? He was not owner of the land, but claimed under him, by virtue of a written contract, which was not given in evidence. Had it been produced, it might perhaps have explained those acts of ownership which were proved on behalf of the plaintiff, and have shewn that he had a right to the spar upon part of the land in question, and not upon the whole. But at all events, whatever the plaintiff's rights may be, as he did not produce the written contract, which was the proper evidence of them, I am of opinion that he did not make out a case which entitled him to a verdict. I am not, however, satisfied that the question was properly left to the jury, and therefore think that the rule for setting aside the verdict should be made absolute; but that it must be done subject to the condition, that a nonsuit be entered.

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HOLROYD, J. † :

I am of the same opinion. Much stress has been laid, in the course of the argument, upon the plaintiff's possession of the

† Bayley, J. was at Chambers.

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spar. Now, although in actions of trespass it is sufficient for the plaintiff to prove possession without shewing how he obtained it, yet there is a great difference between cases of that description and the present, which is an action of assumpsit. If, indeed, any express contract between *the parties had been shewn, the question of right could not have been entered into; but no evidence of that kind was given: the plaintiff's case rested entirely upon the fact of the spar having been taken by the defendants. Then it is said, that acts of ownership were exercised by the plaintiff; but the evidence leaves it extremely doubtful how far they extended: it appears, too, that the plaintiff's right, whatever it was, arose out of a written agreement, which was not produced; he did not, therefore, prove a right of possession, as well as actual possession, which it was incumbent upon him to do, in order to sustain this action. For these reasons, I think that a nonsuit should be entered.

BEST, J. :

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My opinion was as decided at the trial as it is now, that the plaintiff should be nonsuited; but as the case had been tried once before, and as the plaintiff's counsel pressed me strongly to leave it to the jury to say, whether, although the lease was not proved, the plaintiff was not in possession of the spar, and whether Bond the tenant might not be presumed to have relinquished his right, I thought, that, by complying with their wishes, I should put a speedier end to litigation. Both the objections taken by the defendants' counsel are, in my opinion, valid. When there is no contract of sale, but the plaintiff stands on his right to the property which has been taken, and proceeds against a defendant on an implied undertaking, the plaintiff must make out a clear exclusive right, both to the property and possession; otherwise, after a defendant has paid for the goods, he might be sued in trespass for taking them by another party. In this case, without the lease, the plaintiff proved no right *whatever; for supposing him to have had the possession one day, his right to it might have been determined the next. If possession had been ever so clearly proved, it was necessary to see the instrument under which the plaintiff claimed it, to know

whether his right continued at the time the spar was taken. But the tenancy of Bond put it out of the power of the owner of the land to grant a right to the possession of this spar to the plaintiff. The possession of everything belonging to the land passes to the tenant, unless there be a reservation by the custom of the place (as is often the case, in countries where there are mines), or an express reservation in the lease. Although the tenant would have no right to carry away the spar, he might use it on the farm; and, during his lease, might prevent his landlord from removing it. There would be no necessity of reserving a right of entry for particular purposes, as to cut trees, or kill game, if the tenant's right of possession did not exclude the landlord. I am not aware of any right the landlord has to enter on the demised premises without an express reservation, except to view waste or demand rent. In 10 Viner's Abr. tit. Estate (B. b. 14), 8, it is said, if the lessor, after having leased his lands, without excepting the trees, grants *omnes boscos et arbores*, nothing passes, for these passed to the tenant by the lease. Although the case was, at the request of the plaintiff's counsel, left to the jury, and a verdict taken, as the rest of the Court think there should now be a nonsuit, the rule must be drawn up to enter a nonsuit.

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Rule accordingly.

THE KING v. GEORGE WEBB HALL.†

(1 Barn. & Cress. 123—139; S. C. 2 Dowl. & Ry. 241; 1 L. J. K. B. 20.)

Where A., carrying on trade in partnership with others, had a dwelling-house, and counting-house attached to it in B., the counting-house being used by the different partners who daily resorted thither for the purposes of their trade, and the dwelling-house being occupied by a clerk or servant of the firm, paid by them, as were also the rates, taxes, &c.: Held, that A. and each of his partners was a householder in B. within 26 Geo. III. c. 38, s. 8,† although neither he nor they actually resided with their families in B.

So, also, where the dwelling-house was occupied by one of the partners rent-free, and the taxes, &c., were paid by the firm.

QUO WARRANTO against the defendant for using and exercising the office of register and clerk of the Court of Request in the

† Followed in *R. v. Poynder*, p. 345,
post.—R. C.

‡ Repealed S. L. R. Act, 1871.—
R. C.

1822,
Nov. 28.
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city of Bristol. Plea, that by statute 1 W. & M., a court of request was erected in Bristol, and the mayor, aldermen, and common council of that city, or any three of them, whereof the mayor or one of the aldermen for the time being should be one, were appointed commissioners for hearing and determining all matters and causes in that Court; and were directed to supply any vacancy occasioned by the death *or removal of a register or clerk by the appointment of a successor, which said commissioners, or any three or more of them, were thereby authorised and empowered to execute the powers and authorities of the said Act. That on April 10th, 1818, the office of register and clerk became vacant; and that on May 2nd, 1818, divers commissioners, duly qualified to act, viz. the mayor, four of the aldermen, and eight of the common councilmen, did assemble in the council-house in the said city, in order to nominate some person to fill up the vacancy; and that the defendant was then and there duly appointed by a majority of such of the said persons so assembled as were duly qualified to vote, that is to say, by the votes of two of the aldermen and six of the common councilmen assembled, the said last-mentioned persons being respectively householders within the said city, and duly qualified to act as commissioners, and was then and there, by all of them, the said mayor, aldermen, and common councilmen so assembled, declared to be nominated and appointed by a majority of the persons qualified as aforesaid to the said office. The replication denied that the defendant was, by the votes of a majority of such of the said persons so assembled as were qualified to act as aforesaid, duly nominated and appointed; and also denied that the said persons, viz. two of the aldermen and six of the common councilmen aforesaid, were respectively householders in Bristol, or duly qualified to act as commissioners. Issue thereupon. At the trial before Graham, B., at the Bristol Assizes, 1819, it appeared that the office having become vacant, an election took place on the 2nd of May, 1818, to supply that vacancy. Upon that occasion thirteen persons attended, and gave their votes; *eight for the defendant, and five for Mr. Palmer. The eight persons who voted for the defendant were as follows: Levi Ames, Michael Castle, George Hilhouse

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William Fripp, William Fripp the younger, Levi Ames the younger, Edward Brice, and James George the younger; and one of the persons who voted for Mr. Palmer was Mr. John Haythorn. It was contended on the part of the Crown, that seven of the eight persons who had voted for the defendant, Mr. Hall, were not householders within 26 Geo. III. c. 38, s. 8, and consequently that Mr. Hall was not duly elected.

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Levi Ames, at the time of the election, carried on the business of a drysalter, on premises within the city of Bristol, in partnership with three other persons; and there was annexed to these premises a dwelling-house, the property of Levi Ames only. There was formerly an internal communication between the dwelling-house and the other premises, which had been closed up recently, but whether before or after the election in question did not appear. This house was occupied by one S. Cuff, his wife and maid servant. The furniture belonged to S. C., who, however, did not hold the house under any lease, but merely occupied it as the clerk and servant of the firm, receiving wages from them, and liable to be dismissed from his situation as a servant, and from the dwelling-house at their pleasure. This house was assessed to the King's taxes, and rated to the poor-rates in the name of the firm; and the taxes and rates were paid by them. Levi Ames was in the habit of resorting daily to the premises and dwelling-house in the city for the purposes of his business; but he never slept in the dwelling-house, or upon any other part of the premises, nor was any bed ever reserved for him there, his dwelling-house *being in the parish of Clifton, in the county of Gloucester, where he constantly, and on the 2nd of May, 1818, resided with his wife and family.

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Michael Castle and his three partners carried on the business of rectifiers, &c., in premises in the city of Bristol. Attached to these premises was a dwelling-house, the property of his two nephews, one of whom only was a partner in the trade with him. The counting-house of the company formerly constituted part of the dwelling-house. There was a door between them. The dwelling-house was in the occupation of the partners, who frequently met in the same for the purposes of their business, as well as in the other parts of the premises. Tovey, a clerk to

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the firm, with his wife and servant, resided in the house, having been placed there as a clerk by the partners for the protection of the property, and being liable to be dismissed from his situation, and from the dwelling-house at their pleasure. This house was assessed in his name to the King's taxes, but was rated to the poor in the name of the firm, by whom the rent, taxes, and rates, were all paid. A servant boy, whose wages were paid by the partnership, also slept in the dwelling-house. Castle, with his wife and family, resided at Stapleton, in the county of Gloucester, previously to, and on the 2nd of May, 1818.

The case of George Hilhouse was similar to that of Levi Ames.

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William Fripp, with his partners, William Fripp the younger and two others, carried on the business of soap manufacturers on premises within the city of Bristol, to which a dwelling-house, communicating therewith, was attached; but the dwelling-house had been wholly unoccupied for some years, and was so on the 2nd of May, 1818. There was a counting-house, in which the business of the firm was conducted, which communicated with the dwelling-house, and Fripp the elder was in the habit of going there almost daily, the business of the firm being conducted on the premises. The premises were not assessed to the assessed taxes, but were rated for the poor-rate, watch-tax, paving-tax, gaol-tax, and dock-tax, which rates were paid by the firm. There was a watchman set in the warehouses at night to guard the premises, but he had no command of the dwelling-house, and could not enter it, the door being locked. Fripp the elder, with his partners, Edward Brice and four others, also carried on the business of bankers, in a building within the city of Bristol, belonging to that banking firm. This building consisted of the banking and counting-house, and a dwelling-house behind them, in which, at the time of the election, and for two or three years before, one of the partners, named New, resided with his family, rent-free. This house was assessed to the King's taxes, and rated to the poor, in the name of the firm, who paid taxes and rates for the same. Fripp the elder was in the habit of resorting to the bank and counting-house frequently, but not to the dwelling-house, that being reserved for New.

Fripp the elder had not served any parish office in respect of this property, but had served as a special juror for the city of Bristol. He did not sleep there, nor was any bed ever kept there for him, his actual residence at the time of the election being at Kingsdown, in the county of Gloucester.

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William Fripp the younger, was one of the partners in the soap manufactory, and as such, was in the constant habit of resorting to and using the *premises. He had not any other house property in Bristol, and had not served any parish office in Bristol, nor on the grand jury. His residence, at the time of the election, was in the parish of Henbury, in the county of Gloucester.

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Levi Ames, junior, at the time of the election, in partnership with Robert Rankin, carried on the business of a manufacturer of sweets, on premises belonging to himself in the city of Bristol. The premises consisted of a dwelling-house and warehouse, with a communication between them. In the dwelling-house there was a counting-house and committee-room, to which he was in the habit of resorting for the purposes of the business. The furniture in the dwelling-house belonged exclusively to Rankin, who paid no rent, and only occasionally slept there, but not with his family, or any part of it, his house being a mile off; at all times somebody slept there, for the security of the house, either Rankin or a clerk. The domestic servants of this house were paid by Rankin. Levi Ames, junior, never slept in this house, nor was any bed ever kept for him there, his actual residence with his wife and family being, at the time of the election, and long before, at Clifton, in the county of Gloucester. He had not served any parish office in respect of this property, but had served upon the grand and special juries for the city of Bristol. The dwelling-house was assessed to the King's taxes in the name of Rankin; but to the poor-rate in the name of the firm, by whom the rates and taxes were paid.

Edward Brice was one of the partners in the before-mentioned banking-house of William Fripp & Co., the circumstances of which have been already stated. He also, in partnership with others, *carried on the trade of a sugar-refiner, on premises in the city of Bristol, attached to which was a dwelling-house,

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which had not been occupied by any one for many years, and which, at the time of the election, was rated as a warehouse. One room in it was used by him, almost daily, for a counting-house. The only furniture consisted of some chairs in the counting-house; the rates and taxes were paid by the firm. His actual residence, at the time of the election, and long before, was at Frenchay, in the county of Gloucester. The above seven were the votes for the defendant, to which objection was made.

John Haythorne, (who had voted for Mr. Palmer,) at the time of the election, was mayor of Bristol, and as such, resided rent-free, during his mayoralty only, in the mansion-house within the city which belonged to the corporation, who were assessed to and paid all rates and taxes for it. The furniture (except a few articles) belonged to the corporation. At the time of the election, and long before, Mr. Haythorne's own private residence was in the county of Gloucester.

The above persons had all uniformly acted as commissioners of the Court of Requests. The question was, which of the two candidates had the majority of legal votes. Four of the votes given for Mr. Palmer, and one of those given for the defendant, were admitted to be good. If five out of the first seven were good votes, or if four only of them were good, and Haythorne's vote bad, then the defendant had a majority. In any other case the verdict was to be entered for the Crown. This case was argued on a former day in this Term by

Selwyn, for the Crown :

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The question is, whether these persons are householders within the meaning of *the 26 Geo. III. c. 38, s. 8, which is a general Act for regulating the time of the imprisonment of debtors, by process of courts for the recovery of small debts, and for ascertaining the qualification of commissioners, and it applies to all courts of requests. By s. 8 it is enacted, that no person shall be capable of acting as a commissioner, unless he be a householder within the county, district, city, liberty, or place for which he shall act, and shall be possessed of a real estate of the annual value of 20*l.*, or a personal estate of the

value of 500*l*. According to the ordinary acceptation of the word "householder," it means "the master of a family living together." In Johnson's Dictionary, "householder" is interpreted "a master of a family," and "household," "a family living together." The Act of Parliament, therefore, requires, that a person, to come within it, should be the master of a family living together within the district for which he acts. Now that would exclude, from the right of voting, all the seven persons who voted for the defendant. These persons did not reside as masters of families in Bristol, for their families lived out of the city; and the mere carrying on their business within the limits is not enough. It may be said, that the servants and clerks were the families of the first three gentlemen living in Bristol; but they were not the servants of them alone, but of them and their respective partners in trade.

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(BAYLEY, J.: In case of an indictment for burglary, how would the premises be described?)

They would be described, certainly, as the dwelling of the partners; but an indictment, describing them as the dwelling-house of one of the partners would be bad; the question therefore still remains open, whether one of several partners, the whole of whom together occupy a *house, is a householder within the meaning of this Act, and whether the true construction is not, that they must be solely the masters of families within the district, and not what might be called fractional householders merely. It may be admitted, that, in *Rex v. Barwick*,† the Court held, that a joint owner of land was liable to take an apprentice, and that it was not distinguishable from *Rex v. Clapp*‡ (which was the case of a sole owner). But there, the word in the statute was "inhabitant," which has always had a more extensive construction than "householder." In the 43 Eliz. c. 2, where the overseers are required to be substantial householders, a more limited construction has been adopted; and in the case of *The Overseers of Weobley*,§ (a note of which, under the name of *Rex v. Sayers and Jones*, is

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† 7 T. B. 33.

‡ 3 T. B. 107.

§ 2 St. 1261.

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to be found in Serjt. Hill's MSS. in Lincoln's-Inn Library, copied from Mr. Ford's MSS.,†) it was held, that an appointment stating the persons appointed overseers to be principal inhabitants was bad. Besides, the 26 Geo. III. c. 38, s. 8, does not merely speak of householders, but annexes a qualification of property also. This shews that by "householders" were not meant owners of houses merely; for if so, the additional qualification would have been unnecessary. There are other Acts *in pari materia* which throw light on this construction. By 22 Geo. II. c. 47, s. 1 (the Southwark Court of Requests *Act) the commissioners are to be persons residing within their districts. The same qualification is required in the Westminster Court of Requests Act, 23 Geo. II. c. 27, s. 1, and in 23 Geo. II. c. 30, for the Tower Hamlets; and the 25 Geo. III. c. 45, from the seventh section of which the clause in question is nearly copied, was an Act for consolidating these very local Acts requiring residence. The word "householder" must, therefore, be taken as synonymous with "resident householder." In Hargrave's Law Tracts, p. 127, the case of the city of London, as to prisage of wines, is discussed. There the words of the charter are, *Quod nullus captor faciet aliquam prisam in civitate prædictâ vel extra de bonis civium, &c.* On this Lord Hale remarks, that "*bona civium*" must not be intended of every freeman of London. But "first, he must be a freeman of London: secondly, he must be a freeman and inhabitant of London; for, though he be a freeman, yet if he inhabit out of London, he shall not be exempted from prisage, even for the wines imported into London; and accordingly it is declared by that judgment of Parliament, Rot. Par. 11 Hen. IV. No. 73,‡ *Le Roy . . . ad declarez per advys des seigniors en parlement, que*

† The following is the note referred to. The defendants were appointed overseers for the town of Weobley, and in the appointment were styled principal inhabitants. It was moved to quash this appointment, because they were not described to be substantial householders. *Et per CURIAM*: The justices must certainly pursue the power given them, which is to

appoint substantial householders, which is a much more limited description than inhabitants; for a man may be an inhabitant, and a principal inhabitant, and not be a householder; so this appointment is void.

‡ This extract, which is not accurately given in the report, is now corrected from the official printed edition of the Rolls of Parliament.—F. P.

nully n'eit ne enjoise tiele fraunchise en ceo cas, s'il ne soit citezein receant et demurant deins mesme la citee; et que toutz autres demurantz en autres citees, burghs, ou villes, eient et enjoissent lour franchise a eux grauntee, sauvant toutditz a nostre seignior le roy son enheritance in ceo cas; and accordingly it was agreed, in *Hanger's* case, 9 Jac. B. R., before cited: thirdly, he must not only be a freeman, and inhabitant, but he must also be a householder within the city; and, therefore, P. 48 Eliz. in *Sned* and *Sacheverall*, a freeman of London, living in London as an inmate, shall not have his exemption; for such *a man contributes not to scot and lot, nor is beneficial to the city; and this privilege was granted *intuitu civitatis*, not *personæ*." And in the report of the case of *Sacheverall v. Snede*, as found in *The Mayor of London v. The Mayor of Lynn*,† a question is stated to have arisen, whether a citizen of London, who has not a family, nor pays scot and lot, but sojourns in the house of another, shall have the benefit of the said charter. In the argument of which case *Coke*, Attorney-General, put this difference of citizens, viz. that there is a citizen *nomine*, a citizen *re*, and a citizen *re et nomine*; but it was resolved, that only the citizen *re et nomine*, viz. he who is a freeman, and also inhabits and pays scot and lot there, shall be free of prisage. The same doctrine is found in *Waller v. Hanger*‡ and in *Waller v. Travers*.§ And all these shew, that the correct interpretation of "householder" is "*pater familias*." If this be so, these votes are all bad; for in none of these cases did the voters reside with their families within the city of Bristol. As to Haythorne's vote, it is clearly good, he being, as mayor at the time, actually resident in the mansion-house. (This was agreed to by *Adam*, for the defendant.) The Crown, then, is entitled to the judgment of the Court.

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Adam, contra:

The word "householder" must not receive so strict a construction. The true meaning is, a person who keeps a house and frequents it for the purpose of his trade or business. It does not

† 1 Bos. & P. 500; S. C., 7 Bro. § Hardr. 301, cited in 1 Bos. & P. Parl. Cases, 120. 502.

‡ Moore, 832.

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follow, because the word "household" means a family living together, that the word "householder" necessarily means *the *pater familias*. The plain object of the 26 Geo. III. c. 38, s. 8, was to provide, that the commissioners should be persons of character and station belonging to the district. And the present restriction sought to be imposed, viz. that a party must sleep in the house within the district, would be very injurious. The statute may be sufficiently complied with, if the party has a counting-house in the place. Lord Coke, in his reading on the Statute of Bridges,† lays it down thus: "If a man dwelleth in a foreign shire, &c., and keepeth a house and servants in another shire, &c., he is an inhabitant in each." According to the argument on the other side, there is no distinction between householders residents, and householders. But if so, how is it to be accounted for, that the Legislature continually distinguish between them? In 26 Geo. III. c. 100, they speak of "inhabitants householders," and "inhabitants householders resiants," which shews the distinction between them; and in the *Pontefract* ‡ and *Ilchester* § election cases, in which Noy, Selden, and Coke took a part, it was held that the common law right was in inhabitants householders resiants within the borough. The word "resiant," therefore, is always added where an actual dwelling within the district is required. As to the objection that "householders" cannot include "joint-householders," the case of *Rex v. Barwick* is material. For Lord KENYON expressly says, that there the defendant occupying lands to the value of £23, that being his aliquot part of the whole, was an inhabitant. And although the 11 Geo. I. c. 18, s. 7, confines the right of voting for aldermen and common councilmen of London to freemen

[*135] being householders, *yet the 10th section expressly provides, that partners in trade, and joint occupiers, may vote in respect of their joint houses, if of sufficient value. This shews the intention of the Legislature in cases like the present. As to the cases of the prisage of wines, they are different. There the grant being in diminution of the revenue, was properly construed strictly, and so as to include as few as possible. Here the office being for

† 2 Inst. 702.

‡ Glanville, 18.

§ Ibid. 141.

the public good, the clause describing the qualification of the commissioners ought to be liberally construed, and so as to include as many as possible. Then if so, these votes are all good. The first three occupy the dwelling-houses by their servants, and in the strictest construction are householders: *Bertie v. Beaumont*.† In an indictment for burglary, the house would be described as their dwelling-house: *Rex v. Stock*.‡ As to the others, Ames junior may be considered as occupying the premises by Rankin, who acted in this respect as his clerk, only sleeping there occasionally for the protection of the property; and the rest fall within the general principle contended for, that they are partners using the houses for the purposes of their respective trades. The defendant is therefore well elected, having a majority of legal votes.

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Selwyn, in reply :

The Statute of Bridges and the 26 Geo. III. c. 100, are not *in pari materiâ*, and cannot serve to explain the meaning of the word "householder" in 26 Geo. III. c. 38; and 11 Geo. I. c. 18 is in favour of the Crown, for it is expressly stated to be passed with a view to quiet disputes. It would follow, therefore, that but for that Act, joint occupiers and partners are not *householders, and cannot vote. The case of burglary proves satisfactorily that the house may be laid to be the dwelling-house of the firm. But it does not follow from that, that it is the dwelling-house of each member. Yet it must be so, or the argument for the defendant in this case is not well founded.

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Cur. adv. vult.

And now on this day, the judgment of the COURT was delivered by

ABBOTT, Ch. J. :

This case depends entirely upon the meaning of the word "householders," as used in the statute 26 Geo. III. c. 38. By the statute 1 W. & M. the mayor, aldermen, and common council

† 16 East, 33.

‡ 11 R. B. 605 (2 Taunt. 339;
2 Leach, 1015).

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of Bristol were appointed the commissioners of this Court of Requests. Under this statute, therefore, the official corporate character was the only qualification. Many Acts for the establishment of similar Courts had been passed before the 26 Geo. III.; the statute of that year is a general law, and must be understood in reference to this Court in Bristol, to have superadded the qualification of householder to the qualification before required. Now, the meaning of particular words in Acts of Parliament, as well as other instruments, is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained.† The meaning of the word “inhabitants” in the Statute (22 Hen. VIII. c. 5) of Bridges, which was referred to at the Bar, affords an illustration of this proposition very applicable to the present case. The inhabitants of any county, city, or other place, taking *that word either in its strict or in its popular sense, are those persons only who have their dwelling therein, and all persons who have their dwelling therein are inhabitants thereof. But the object of the statute being to raise a fund for the repair of bridges, by the taxation of persons to a reasonable aid and sum of money for that purpose, and to enforce the payment of the tax in case of refusal, by distress on the lands, goods, and chattels of the persons taxed, the word “inhabitant” has been held on the one hand to include all the occupiers of lands in the county, &c. although actually living and dwelling, not in that county, but in some other; and on the other hand, not to include servants, lodgers, or inmates, although actually dwelling and abiding in the county.

The object of the stat. 26 Geo. III. c. 38, appears to have been to unite respectability of character and circumstances in the place wherein the office of commissioner was to be exercised, with a habit of access and resort to that place. This object is attained by the exclusion of lodgers or inmates, having no permanent interest in the place, although a temporary residence, as well as persons having neither residence in the place, nor any such connection with it, as may induce a habit of access and resort to it.

† This sentence is cited in the judgment of the Judicial Committee in *The Lion* (1869) L. R. 2 P. C. 530, 38 L. J. Adm. 54.—R. C.

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The word is "householders," not "housekeepers," and this word "householders," taken in any sense, will certainly exclude the classes that I have mentioned, and probably some others also, though it be not of so strict a sense as the word "housekeepers." It is sufficient for the purpose of this cause, if five of those who voted for the defendant, and whose right to vote is disputed, shall be found to be householders within the true meaning of this statute. And we think that five such *are found, viz. Levi Ames the elder, Michael Castle, George Hilhouse, William Fripp the elder, and Edward Brice. Each of them, with his partners, is the tenant or holder of a dwelling-house; each, either by a servant or partner, sleeps in such house; and each is in the daily habit, for the purposes of business, of resorting to such dwelling-house, or to some of the buildings connected with it. In the first case, that of Levi Ames, the dwelling-house belongs to him; it is annexed to the premises where the partnership business is carried on, and it is occupied by a clerk of the partnership in the character of such clerk. In the next two cases, Castle's and Hilhouse's, one or more houses, attached to the premises where the partnership business was carried on, and rented by the partnership, were occupied by servants of the partnership, in their character of servants. In all these cases, the rent, rates, and taxes were paid by the partnership. In the two remaining cases, of William Fripp the elder, and Edward Brice, they both belonged to a banking-house, and a dwelling-house behind the bank was occupied by Edward New, one of their partners, in the character of partner. This dwelling-house belonged to the firm; they paid the rates and taxes, and New paid no rent. In each of these five cases, therefore, there was a dwelling-house belonging to or rented by the partnership; the charges upon it were paid by the partnership; it was attached to the premises on which the partnership business was carried on; and was inhabited as a dwelling-house, either by some of the servants of the partnership, or by a partner; and, under these circumstances, we are of opinion, that each partner before named, is, under the 26 Geo. III., to be deemed a householder. It is, therefore, *unnecessary to say anything, as to either of the other persons who voted for the defendant. It will be obvious to every one who has the slightest

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knowledge of the modern habits of persons engaged in the most respectable branches of trade and commerce in all the great towns in England, that an exclusion of persons in the situation of these gentlemen, would be an exclusion, in this and many other cases, of a very large portion of those who are best qualified for the discharge of the particular duty that may be the subject of enquiry. For these reasons we are of opinion, that the defendant is entitled to our judgment in his favour.

Judgment for the defendant.

1822.
Nov. 26.

[142]

REX v. THE INHABITANTS OF PENNEGOES
AND TOWN OF MACHYNLLETH.

(1 Barn. & Cress. 142—143; S. C. 2 Dowl. & Ry. 209.)

The Court will not grant a *certiorari* to remove an indictment from the Quarter Sessions after judgment has been pronounced in that Court.

In this case, a bill of indictment for not repairing a bridge had been found against the defendants at the Quarter Sessions for the county of Montgomery. At the trial a verdict was found for the Crown, and judgment pronounced accordingly, that a fine be imposed upon the defendants.

Sir William Owen now moved for a *certiorari*, to remove the indictment into this Court for the purpose of taking objections to it, and after stating that it was doubtful whether a *certiorari* ought to issue in this stage of the proceedings, he referred the Court to *The Queen v. Dixon*,† and *The King v. The Inhabitants of Oxfordshire*,‡ and *Rex v. Nicholls*,§ where LEE, Ch. J. recognises the authority of *The Queen v. Dixon*; and he suggested that it would be hard upon the defendants to refuse this application, as the consequence would be, that they must have recourse to the more costly remedy of a writ of error.

PER CURIAM :

The defendants have thought proper to take the chance of suc-

† 1 Salk. 150; 3 Ibid. 78; 2 Ld. Raym. 971; 6 Mod. 61.

‡ 12 R. R. 386 (13 East, 411).
§ 12 R. R. 388 (13 East, 412, n).

ceeding at the Sessions. They ought clearly to have applied for a *certiorari* before the *trial, and it ought not to issue in this late stage of the proceedings. They can now avail themselves of objections to the indictment by writ of error only.

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[*143]

Rule refused.

[Sequel upon writ of error, 2 B. & C. 166, will be reported in 26 R. R.]

K. B. HILARY TERM.

BRANSCOMB v. BRIDGES AND ANOTHER.

(1 Barn. & Cress. 145—146; S. C. 2 Dowl. & Ry. 256; 1 L. J. K. B. 64; S. C. at Nisi Prius, 3 Starkie, 171.)

1823.
Jan. 23.
[145]

Where the goods of A. were distrained for rent arrear after the amount had been tendered: Held, that A. might bring an action on the case for an excessive distress.

CASE for an excessive distress for rent-arrear. Plea, Not guilty. At the trial before Abbott, Ch. J. at the Middlesex sittings after last Term, the plaintiff proved, that the rent in arrear had been tendered before the distress was made. It was objected, for the defendants, that the action should have been in trespass and not in case. The LORD CHIEF JUSTICE overruled the objection, but reserved liberty to the defendants to move to enter a nonsuit, and the plaintiff had a verdict; and now

The *Solicitor-General* moved accordingly, and contended, that, as the rent due had been tendered before *the distress was made, and no subsequent demand and refusal of it was proved, the taking of the plaintiff's goods was without any colour of right, and was, therefore, properly the subject of an action of trespass.

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PER CURIAM :

If the defendants had proved the tender, that would not have been a good defence, and they cannot be in a better situation,

† Followed in *Holland v. Bird* case, will not be reproduced in the (1833) 10 Bing. 15, which, being Revised Reports.—F. P. entirely covered by the principal

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because the proof came from the plaintiff. Supposing that trespass would lie, still the plaintiff was at liberty to waive the trespass, and bring an action on the case. It has frequently been decided, that trover will lie after a wrongful taking, and that is a stronger case; for there the goods are, by the pleadings, stated to have come lawfully into the defendant's possession.

Rule refused.

1823.
Jan. 24.
[146]

WILLIAMSON v. JOHNSON.†

(1 Barn. & Cress. 146—149; S. C. 2 Dowl. & Ry. 281; 1 L. J. K. B. 65.)

Where the declaration stated that a bill of exchange was indorsed by certain persons trading under the firm of H. and F., by procuration of J. D.: Held, that this allegation was supported by evidence of J. D.'s hand-writing, and that he, being the managing partner in a firm which carried on all business of buying and selling under the designation of H. & Co., was in the habit of indorsing bills in the manner above stated; although there was no such person as F. in the firm of H. & Co., and no direct proof that J. D.'s partners were privy to those transactions. One partner may act for the whole firm by procuration.

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ASSUMPSIT on a bill of exchange drawn by J. T., payable to his own order, and accepted by the defendant; indorsed by J. T., to certain persons trading under the firm of Habgood and Fowler, indorsed by H. and F. by procuration of J. Dixon to R. Cowie, and by him indorsed to the plaintiff. At the trial, before Abbott, *Ch. J. at the Guildhall sittings after last Term, it appeared in evidence, that several years ago Habgood and Fowler carried on business together, but about eight years since that firm was changed to Habgood & Co., in which house Dixon was a partner, but in which there was no person of the name of Fowler. From the time of that change, all business of buying and selling was carried on by the partners, in the name of the new firm, but bills were sometimes indorsed by Dixon, in the manner above stated, for the purpose of getting them discounted: no direct evidence was given to shew that Dixon's partners knew of these transactions, but it was proved that he conducted the whole of the business. It was contended for the defendant, that there was no evidence of an indorsement by any persons trading

† *Kirk v. Blurton* (1841) 8 M. & W. 284; Bills of Exchange Act, 1882, s. 23; and Chalmers on Bills, 5th ed. at p. 70.

under the firm of Habgood and Fowler, and that without giving such evidence, the plaintiff could not make out his title to the bill. The LORD CHIEF JUSTICE overruled the objection, but gave leave to the defendant to move to enter a nonsuit, and the plaintiff had a verdict; and now—

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Marryat moved accordingly, and contended, that as there was no evidence that Dixon's partners were privy to the indorsement of the bill in the manner stated, there was no proof that they ever adopted the style and firm of Habgood and Fowler. Now, although the plaintiff was not bound to set out that indorsement, yet, as he has thought fit to do so, he is bound to prove it as stated. And even if it be held that H. & Co. did adopt the style of H. and F. for this purpose, still Dixon, being a partner in the firm of H. & Co., cannot properly be said to have indorsed the bill by procuration of that firm.

ABBOTT, Ch. J. :

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It appears by the evidence, that Habgood, Dixon, and a person named Lye, carrying on business in partnership together, were known by the description of Habgood & Co. All their transactions of buying and selling were carried on in that name, but Dixon, who was proved to be the manager of the whole business, was also in the habit of indorsing bills in the names of Habgood and Fowler, by procuration, for the purpose of getting them discounted. The question then is, whether that sufficiently proves the existence of persons using, for the purposes of business, the style and firm of Habgood and Fowler. At the trial I was at first inclined to yield to the objection, but afterwards altered my opinion. I still think, that, as between third persons, there was sufficient evidence of an indorsement, by persons using the style and firm of Habgood and Fowler, inasmuch as Dixon, the managing partner in the firm of Habgood & Co., was in the habit of issuing bills into the world, indorsed under the former designation. The verdict was therefore right, and this rule must be refused.

BAYLEY, J. :

I am of opinion that there was evidence to shew that the new

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firm, Habgood & Co., for certain purposes of trade, used the designation of the old firm, Habgood and Fowler; for Dixon, who was entrusted with the management of the business, was in the habit of indorsing bills by the designation of that firm, probably because they had credit at the Bank. If the style of Habgood and Fowler were not adopted by the new firm, this indorsement by Dixon would be a forgery, as being an indorsement in the names of fictitious persons, for the purpose of fraudulently gaining credit for the bill. *But, under the circumstances of this case, there is no pretence for saying that any such crime has been committed. I think, therefore, that there was evidence of the existence of persons using the style and firm of Habgood and Fowler, for certain purposes of business; and there is no doubt that one partner may, by procuration, indorse bills for the firm. There is not, therefore, any ground for this motion.

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HOLROYD, J. :

I am of opinion that the verdict was rightly found for the plaintiff. This was an action by a third person, to whom the bill had been indorsed, in the form set out in the declaration; and it seems to me that evidence of Dixon's handwriting would, as between third persons, have been sufficient, without proof of any usage on his part to indorse bills in this manner; but here there was evidence to shew that certain persons, for particular purposes of business, used the style of the old firm, Habgood and Fowler. It has been urged that one partner cannot act by procuration for the others: even if that were so, it would not, in my opinion, be a sufficient defence to this action. There was proof, however, of an acting by procuration, and I am of opinion that one partner may so act for the whole firm.

BEST, J. concurred.

Rule refused.

CATHERWOOD AND ANOTHER, ADMINISTRATORS DE BONIS
NON OF J. CATHERWOOD, DECEASED, *v.* CHABAUD.

(1 Barn. & Cress. 150—156; S. C. 2 Dowl. & Ry. 271; 1 L. J. K. B. 66.)

1823.
Jan. 25.

[150]

Where a bill of exchange was indorsed generally, but delivered to S. C. as administratrix of J. C., for a debt due to the intestate, and S. C. died intestate after the bill became due, and before it was paid: Held, that the administrators *de bonis non* of J. C. might sue upon the bill; and that their title was sufficiently proved by the letters of administration *de bonis non*, without producing those granted to S. C., the administratrix.

Defendant having pleaded an agreement made between the plaintiffs and other creditors of the defendant, of the one part, and defendant of the other part, that the defendant should assign certain credits and effects to two persons upon certain trusts; and that plaintiffs agreed to accept those conditions in discharge of their demand, provided all the creditors assented; that defendant did assign, and that all the creditors assented. The replication denied that all the creditors assented: Held, that the affirmative of the issue being on the defendant, he was bound to prove the assent of all his creditors.

Semble, that he was bound to prove the assent of the plaintiffs as well as that of his other creditors.

ASSUMPSIT by administrators *de bonis non* of J. C. the elder, on a bill of exchange indorsed to S. C., in her lifetime, as administratrix of the said J. C., profert of the letters of administration *de bonis non* granted to the plaintiffs. Pleas, first, general issue. Secondly, that after making the promises set out in the declaration, and after the death of S. C. the administratrix, it was agreed between the plaintiffs, as such administrators as aforesaid, and certain other creditors of the defendant on the one part, and defendant on the other part, that defendant should assign certain credits and effects to two of his creditors upon certain trusts; and that plaintiffs and the other creditors would accept those conditions in discharge of their demands, provided that the whole of the creditors of the said defendant should join; that all the creditors did join, and defendant assigned his said credits and effects. Replication, that all the creditors did not join. At the trial before Abbott, Ch. J., at the Guildhall sittings after last Term, it was proved for the plaintiffs, that the bill in question was accepted by the defendant, and was afterwards indorsed generally, but delivered to S. C. as the administratrix of J. C., the elder, *for money due to him in his lifetime; and that after the bill became due, S. C. died without having commenced any

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proceedings upon it. The defendant produced the agreement mentioned in the second plea, which was signed by several persons, but he offered no evidence to shew that those were the whole of the creditors, and it did not appear that the plaintiffs had assented. It was then objected for the defendant, first, that the bill was held by S. C. in her own right, and not in her representative capacity; and that, therefore, the right of action was in her personal representative, and not in the administrators *de bonis non* of J. C.; and that there was no privity between the plaintiffs and the administratrix of J. C. Secondly, that upon this record it was incumbent on the plaintiffs to prove the grant of letters of administration to S. C.; and, thirdly, that they were bound to shew that some of the creditors had not joined. The objections were overruled by the LORD CHIEF JUSTICE, and the plaintiffs had a verdict, with leave to the defendant to move to enter a nonsuit. And now—

The *Solicitor-General* moved accordingly:

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If a person to whom a debt is due die intestate, and the debtor give a bill for the amount to his administrator, and the administrator also dies intestate before the bill is paid, the bill goes to the administrator of the latter, and not to the administrator *de bonis non* of the original creditor: *Barker v. Talcot*.† There the debtor gave a bill to the administrator of his creditor, and afterwards paid the amount of it to the personal representative of the administrator, and not to the administrator *de bonis non* of the first creditor, and the LORD CHANCELLOR decided the payment to be a good discharge of the debt. And in *Yates v. Gough*,‡ it appeared that Gough being indebted to Cowper who died intestate, Cowper's widow, as administratrix, sued and recovered judgment against Gough, but also died intestate before execution; and it was held that Yates, who took out administration *de bonis non* of Cowper, could not bring a *scire facias* upon the judgment, because there was no privity between him and the first administratrix. There are also cases which decide that when the property remains in specie it goes to the administrator *de bonis non*, but a distinction is taken where the cause of action

† 1 Vern. 473.

‡ Yelv. 33; Cro. Jac. 4; Mo. 680, S. C.

arises out of a new promise made to the first administrator: *Betts*, executor, v. *Mitchell*.† Then, secondly, the plaintiffs were bound to show their title, as they declared upon a cause of action arising after the death of the intestate whom they represented: *Hunt v. Stevens*;‡ and they could not do that without producing the letters of administration granted to S. C., the administratrix, which was not done. The plaintiffs were also, upon the issue on the second plea, bound to show the dissent of some creditors besides themselves; for their own assent was admitted by the form of the issue, and it would have been calling upon the defendant to prove a negative if he were required to shew that no creditors existed besides those who signed the agreement.

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ABBOTT, Ch. J. :

It struck me at the trial that the defendant was bound to prove that all his creditors had *assented to the arrangement proposed; and a witness was called by him for the purpose of shewing the assent of the plaintiffs. In this, however, he failed; nor did he, in fact, prove the signature of any one creditor. The affirmative of the issue was certainly upon the defendant; and there is nothing in this case to prevent the application of the ordinary rule as to the burthen of proving such an issue, for the plaintiffs were strangers to the defendant's concerns, and cannot be supposed to know who were his creditors. The first point which has been taken is of more importance. It was clearly established by the evidence that the bill in question was given to S. C., as the administratrix of J. C., for money due to her intestate; she took it as assets, and if she had received the money, that must undoubtedly have been accounted for to his estate. The money not having been received in her lifetime, the bill remained as a part of J. C.'s estate, and the right to it devolved upon the persons who afterwards became his representatives. This case differs widely from *Barker v. Talcot*; for there the debtor had actually paid the executor of the administrator: now such a payment would, in equity, and might, perhaps, in law also, be a sufficient answer to any action afterwards brought to enforce payment of the same debt over again. Here no payment has

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† 10 Mod. 316.

‡ 3 Taunt. 113.

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been made by the debtor, who, therefore, cannot be damnified by this action. It has been decided in a variety of modern cases that an administrator may sue *as such* upon a promise made to him in his representative character; and that principle governs my opinion upon the present case; for where the cause of action is such that the first administrator may sue in his representative character, the right of action devolves upon the administrator **de bonis non* of the intestate. With respect to the other point, I think that the form of the letters granting administration *de bonis non*, as set out in the profert, was sufficient proof of the title of the plaintiffs; but, at all events, the neglect to produce the letters of administration granted to S. C. would not be a sufficient ground for sending the case to a new trial, when the objection could be obviated by the production of that instrument, it not being disputed that administration was duly granted to her.

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BAYLEY, J. :

It was decided in the case of *King v. Thom*[†] that if a bill be indorsed to A. and B. as executors, they may declare as such in an action against the acceptor. In *Cowell v. Watts*[‡] it was held that an administrator may sue in his representative character upon promises made to himself, where the money will be assets when recovered. Now, if the administrator dies intestate, without having sued upon such a promise, the administrator *de bonis non* may sustain an action upon it; for he succeeds to all the legal rights which belonged to the administrator in his representative capacity. Here S. C., the administratrix of J. C., might have sued *as such* upon the bill in question. This action was therefore properly brought by the administrators *de bonis non*. By this mode of proceeding the money recovered is immediately applicable to the right fund, as assets of the first intestate; whereas, if the action had been brought by the personal representative of the administratrix of J. C., it would, in the first instance, have become a part of her estate, and must **afterwards* have been transferred from that to the estate of J. C., the first intestate. With respect to the onus of proving the issue on the second plea, I think that, as the affirmative was upon the

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† 1 T. R. 487.

‡ 6 East, 405; 2 Smith, 410.

defendant, it was for him to adduce the proof; and it seems to me that the issue involves the necessity of shewing a consent by the plaintiffs as well as the other creditors.

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CHABAUD.

HOLROYD, J. :

I am of the same opinion. The decisions in the old cases proceeded upon the principle that contracts made with an administrator were personal to him, and that he must sue upon them in his own right, and not in his representative capacity. That principle has since been altered, and it has been ruled in several modern cases, that upon such contracts, an administrator may sue in his representative character. The older cases have, therefore, received a qualification, and are not now to be considered as law to their full extent. As to the objection that the letters of administration granted to S. C. were not produced, I think that the letters granted to the plaintiffs, of which profert was made, sufficiently proved both the administrations. The affirmative of the issue was upon the defendant; he therefore was bound to prove it.

BEST, J. :

In refusing this rule it is not necessary to decide that the administrator of the administratrix, S. C., could not have sued; it is sufficient to say, that the administrator *de bonis non* might sue; and this observation may serve to reconcile the various cases which have been referred to. An action by the administrator *de bonis non* was certainly the most proper, that being the shortest and most convenient mode of bringing the *money recovered into the funds of the original intestate. There is not, therefore, any foundation for the first objection; and I agree with the rest of the Court in thinking the others equally invalid.

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ABBOTT, Ch. J. :

There is much weight in the distinction which has been taken by my brother BEST. There may be cases where the administrator of an administrator might and ought to sue, viz. if the first administrator had made himself debtor to the intestate's estate for the amount of a bill received in payment of a debt due to that estate.

Rule refused.

1823.
Jan. 24.

IVESON, GENT., ONE, &C. v. CONINGTON,
GENT., ONE, &C.

[160]

(1 Barn. & Cress. 160—162; S. C. 2 Dowl. & Ry. 307; 1 L. J. K. B. 71.)

Where the attorneys for the plaintiff and defendant, in a cause which was ready for trial, entered into an agreement whereby they *personally* undertook that the record should be withdrawn, that certain things should be done by the plaintiff and defendant, and that costs should be taxed for the defendant in a certain manner: Held, that the attorney for the plaintiff was personally bound to pay the costs when taxed in the mode specified.

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ASSUMPSIT. The declaration stated that, by a certain agreement made between them, they, the plaintiff and defendant, did personally consent, undertake, and agree, that the record in a certain cause wherein one W. L. was plaintiff, and one J. S. was defendant, and in which cause the now defendant was attorney for W. L., and the now plaintiff was attorney for J. S., should be withdrawn; that the said J. S. *should take back again the horse in the pleadings in that cause named, and should pay a certain sum of money then agreed upon in that behalf to the said W. L.; that the costs of the said suit on the part of J. S. should be taxed between the parties on the principle between plaintiff and defendant; and that such taxation should be made and perfected by certain persons therein mentioned. The declaration then averred mutual promises, performance by J. S. and the now plaintiff; and that the costs of the suit on the part of J. S. were taxed in the manner appointed, and amounted to 89*l.* 2*s.* 11*d.*, which then became due to the now plaintiff under the said agreement and taxation, whereof defendant had notice, yet defendant would not abide by the taxation, nor would he pay the costs to the said plaintiff. Plea, general issue. At the trial before Abbott, Ch. J., at the London sittings after last Term, the plaintiff gave in evidence an agreement signed by the defendant, corresponding with that set out in the declaration, and proved the taxation of the bill in the manner appointed by the agreement; no demand of costs had been made upon W. L., the plaintiff, in the former suit. For the defendant, it was objected, that the agreement contained no promise by him to pay the costs awarded. The LORD CHIEF JUSTICE overruled the objection;

and the plaintiff having obtained a verdict, the defendant had leave to move to enter a nonsuit. And now—

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CONINGTON.

Denman moved accordingly, and contended, that although the present defendant, as attorney for the plaintiff in the former suit, personally undertook that certain things should be done, yet that did not bind him to do *them. At all events, the defendant can only be considered as a surety, and cannot be called upon to pay this money until default has been made by his principal. Now it appears that no demand has been made upon Mr. L., and therefore, admitting that under some circumstances the defendant may be compelled to pay the sum awarded for costs, still the action was premature.

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Per CURIAM :

The case of *Burrell v. Jones*† is not distinguishable from the present, for this agreement contains by implication, a promise to pay the costs when taxed ; and the defendant having personally undertaken that the stipulations contained in that agreement shall be performed, is liable to an action for the non-performance of them. He cannot be considered a surety, for his client was not bound by that arrangement.

Rule refused.

REX v. THOMAS POYNDER, SEN.

1823.
Jan. 28.

(1 Barn. & Cress. 178—180; S. C. 2 Dowl. & Ry. 258; 1 L. J. K. B. 65.)

A., B., and C. carrying on trade in partnership, had a dwelling-house, yard, and premises, in a parish in London; all the partners were in the habit of frequenting the premises daily for the purpose of business, but none of them resided there. The dwelling-house was inhabited by a clerk, who managed the business for them, but the rent, rates, and taxes were paid by the firm: Held, that each of the partners was a householder within the 43 Eliz. c. 2, and liable to serve the office of overseer.

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INDICTMENT against the defendant, for refusing to take upon him the office of overseer of the poor of the parish of St. Ann's,

† 22 R. B. 296 (3 B. & Ald. 47).

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v.
POYNDER.

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Blackfriars. Plea, Not guilty. At the trial before Abbott, Ch. J. at the London sittings after last Michaelmas Term, the only question was, whether the defendant was a householder, within the meaning of the 43 Eliz. c. 2. It appeared that the defendant, William Hopson, and Thomas Poynder the younger, were lime merchants and co-partners, and were the owners of a dwelling-house, yard, premises, and building in Earl Street, in the parish of St. Ann, Blackfriars, in the city of London, but that neither of them ever slept there, the defendant and Poynder the younger dwelling at Clapham Common, and Hopson at Stamford Hill, in the parish of Tottenham, in the county of Middlesex. One Medlicott, who managed the business for them, resided *in the house in Earl Street. The rent, rates, and taxes were paid by the firm. Each of the partners frequented the premises daily, for the purpose of business, and the defendant had once voted at an election of a lecturer, which was a privilege belonging to resident householders. It was contended at the trial, that the defendant was not a householder within the statute of Elizabeth. The LORD CHIEF JUSTICE was of opinion that he was, and a verdict was found for the Crown.

Denman, Common Serjt. now moved for a new trial :

In the late case of *Rex v. Hall*,† this Court decided that one of several partners resorting daily for the purposes of business to a house rented by all, but which was inhabited by their servant, was a householder in the place where the house was situate, so as to qualify him to be a commissioner of a court of requests. The object of the statute in that case was to confer a privilege. The object of the 43 Eliz. was to impose a burden on the persons therein described. A different rule of construction ought therefore to prevail here. By the 59 Geo. III. c. 12, s. 6, it is enacted, “that justices in special Sessions may, at the request of the inhabitants of any parish, appoint any person who shall be assessed to the relief of the poor thereof, and shall be a householder resident within two miles of the church or chapel of such parish, to be an overseer, although he should not be a householder

† Ante, p. 321 (1 B. & C. 123).

within the parish of which he should be appointed overseer." It seems therefore to have been the intention of the Legislature, that an overseer should be a resident householder within a certain distance of the *parish, though not actually resident in the parish. Here the defendant resided more than two miles from the parish of St. Ann, Blackfriars. Besides, he was undoubtedly a householder in Clapham, and might therefore be called upon to serve in two places at the same time an office requiring personal attendance. In an indictment for burglary this might be laid to be the house of Medlicott. In *Margett's* case the house was occupied by the agent of a trading company, and he resided in it with his family, only for the purpose of conducting the trade. The lease was held and the rent and taxes paid by the company. Yet GRAHAM, B. and GROSE, J. at the Old Bailey Sessions, 1801, held an indictment to be good, which stated the burglary as being committed in the dwelling-house of the agent.

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Per CURIAM :

When a similar question was under our consideration last Term, we were not insensible that a distinction might be attempted to be made between those cases where the Legislature intended to confer a benefit, and others where it intended to impose a burden. We were of opinion that there was no foundation for such a distinction, and that the same rule of construction ought to prevail in all cases. We have no doubt in this case that the defendant is a householder within the meaning of the statute of Eliz. It was in evidence that he had enjoyed one of the privileges of a resident householder; for he had voted for a lecturer, which was a privilege belonging to resident householders only.

Rule refused.

† 2 Leach's Crown Cases, 930, 4th ed. See the observations made on this case by Mr. Russell, in his

Treatise on Crimes. See also *Rex v. Stock*, 11 R. R. 605 (2 Taunt. 339, 2 Leach, 1015).

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Jan. 28.

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CRAWSHAY AND OTHERS v. EADES.

(1 Barn. & Cress. 181—186; S. C. 2 Dowl. & Ry. 288; 1 L. J. K. B. 90.)

A. delivered a quantity of iron to a carrier to be conveyed by the latter to B., the vendee in the country. The carrier having reached B.'s premises, landed a part of the iron on his wharf, and then finding that B. had stopped payment, reloaded the same on board his barge and took the whole of the iron to his own premises: Held, that there was no delivery of any part of the iron so as to divest the consignor of his right to stop *in transitu*, the special property remaining in the carrier until the freight for the whole cargo was either tendered or paid, or until he had done some act shewing that he assented to part with the possession of the goods without receiving his freight.

TROVER for 20 tons of iron. Plea, Not guilty.

At the trial before Abbott, Ch. J., at the London sittings after last Michaelmas Term, the following appeared to be the facts of the case. The plaintiffs were iron merchants in London; the defendant was a common carrier by water, and for several years had been in the habit of carrying iron along the line of canal from the Brierly Hill ironworks, belonging to W. Hornblower, situate near Stourbridge in Worcestershire, to Brentford in Middlesex, and there shipping it in other boats belonging to the plaintiffs, in which it was conveyed to their premises in London, and the plaintiffs, during the same time, had been in the habit of sending large quantities of foreign iron by the defendant's return boats, to Hornblower. The practice, as proved by the plaintiffs' own witness, had been, to deliver to the carrier, when the iron was shipped, a ticket specifying the quantity, and upon arrival at Hornblower's wharf, to weigh it, and to give the carrier a receipt for the quantity so weighed and delivered. On the 26th January, 1822, the plaintiffs loaded at Brentford, on board two barges belonging to the defendant, 348 bars of iron, and delivered the following ticket: "Shipped 348 bars of iron, weight 205. 0. 20., for Messrs. Hornblower, Brierly Hill, near Stourbridge, from R. and W. Crawshay & Co." The iron was sent to Hornblower on sale. On the 8th February the barges with the iron arrived at Hornblower's works, and on the 9th a part out of each *of the barges was landed upon his wharf. The defendant then hearing that Hornblower was gone off, enquired of his confidential clerk, who

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informed him that it was all over with the Brierly works, and told him that he the defendant had better take the iron on his own account. The defendant, in consequence, reshipped the part that had been landed, and conveyed the whole to his own premises. He afterwards sold part, in order to discharge Hornblower's debt to him, and delivered the residue, under an indemnity, over to the assignees, under a commission of bankruptcy, which had issued against Hornblower. It appeared that Hornblower had been in the habit of paying the freight for the iron shipped by himself, as well as for that shipped by the plaintiffs. The defendant having given notice that all goods received by him for carriage would be retained, not only for the particular carriage, but for all arrears, claimed, in the first instance, to retain the iron in question for his general balance. The LORD CHIEF JUSTICE was of opinion at the trial, that there was no actual delivery to Hornblower of any part of the iron, so as to divest the plaintiff of his right to stop *in transitu*, and the jury found a verdict for the plaintiff for the value of the iron. It was now stated in an affidavit, that it had never been the usage to weigh the iron, or give a receipt for it at Hornblower's wharf; and the witness who at the trial gave evidence to that effect now swore that it was by mistake.

Marryat now moved for a new trial :

Here there was a complete delivery of part of the iron to Hornblower, for it was landed upon his wharf. Nothing remained to be done on the part of the seller.

(ABBOTT, Ch. J. : The freight of the goods was to be ascertained *by weighing, and they had not been weighed.)

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It appears by the affidavit that it was not the practice, as between these parties, to weigh the iron in order to ascertain the freight, nor to give a receipt to the carrier; and if so, then there was a delivery of part; and by a delivery of part of one entire cargo by the master of a ship to the consignee, the property in the whole completely vests in him, and the consignor cannot stop *in transitu*.

ABBOTT, Ch. J. :

The whole question in this case is, whether there had been a

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delivery or not. There is no case in which a carrier having begun to deliver, and afterwards discontinues, has been held to have made a complete delivery of any part of the goods. The case attempted to be established by the defendant is, that he for his own benefit shall be allowed, as against the assignees of Hornblower, to say that he had not delivered the goods, so as to retain his lien ; and as against the plaintiffs, that he had delivered them, so as to take away their right to stop *in transitu*.

BAYLEY, J. :

[*184] It is quite clear that if the iron was once completely delivered to Hornblower, the transitus was at an end, and his assignees would be entitled to retain it. It is incumbent on them, however, to shew clearly, that such a delivery had been made by the carrier to the vendee as would deprive the former of his lien ; for nothing less than that could take away from the vendor his right to stop *in transitu*. There can be no doubt, that wherever there is a complete delivery of part of one entire cargo to the consignee, the transitus is ended, and the consignor cannot stop the remainder. *But in this case there was no complete delivery of any part of the iron to Hornblower. The goods were in different barges, and a part of the iron was taken out of each barge and landed upon Hornblower's wharf, but he had not taken possession of it, nor was it weighed ; so that the amount of the freight due to Eades might be ascertained. Now, independently of any particular usage, a carrier has, by the common law, a right to insist that the goods shall be weighed, in order, first, that it may be ascertained for his own security that he has delivered the precise quantity entrusted to him ; and, secondly, that the amount of the freight, if it depend upon the weight, may be ascertained. When part of the iron was landed upon the wharf, it might more properly be considered as in a course of delivery, than as actually delivered. By placing it upon the wharf, the carrier did not mean to assent to Hornblower's taking it away without paying the freight. Besides, a carrier has a lien on the entire cargo, for his whole freight ; and until the amount is either tendered or paid, the special property which he has in his character of carrier does not pass out of him to the vendee, unless, indeed, he does

some act to show that he assents to the vendee's taking possession of the property before the freight is paid. It is clear, upon the facts given in evidence at the trial, that the carrier never did assent to Hornblower's taking possession of this property, for he reships the part of the iron that was landed, as soon as he is informed that the freight is not likely to be paid. In order to divest the consignor's right to stop *in transitu*, there ought to be such a delivery to the consignee, as to divest the carrier's lien upon the whole cargo. I am of opinion, therefore, that the entire freight not having been tendered or paid, the delivery in this case was not complete *as to any part; that the special property remained in the carrier; and that the consignor was not deprived of his right of stoppage *in transitu*.

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HOLBOYD, J. :

I am also of opinion that there was not in this case a delivery to the consignee of any part of the iron, so as to divest the consignor's right to stop *in transitu*. By common law, the carrier had a right to insist, before he parted with the possession of any part of the iron, that it should be weighed, so that the precise quantity delivered and the freight due thereon might be ascertained. Until that was done, Hornblower could not say that the property had passed to him from the carrier. That being so, the property still remained in the carrier. The delivery to the consignee was not then complete, and, consequently, the transitus was not ended, and the plaintiffs were entitled to recover.

BEST, J. :

I am of the same opinion. There can be no doubt, that wherever there is a complete delivery of any part of one entire cargo, by a carrier to the consignee, the property in the whole vests in the latter, so as to take away from the consignor his right to stop *in transitu*. The question is, whether there was any actual delivery of any part of the cargo to the consignee. Until the carrier parts with the possession of the goods, the special property which he has in that character remains in him; and it is clear, that he is entitled to retain possession until the freight due to him is tendered or paid. He may, however, assent to the

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consignee's having possession of the goods without payment of the freight; but it is clear, that in this case he never did so assent; for when he was informed that Hornblower's *works had stopped, he immediately reshipped the part of the iron which had been landed, and conveyed the whole to his own premises. The freight, therefore, not having been tendered or paid, and the carrier not having intended to part with the possession, without payment of the freight, his lien still continued. The property, therefore, had not passed from him to the consignee, and consequently, the consignor had a right to stop *in transitu*.

Rule refused.

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Jan. 29.
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PRINCE v. CLARK.

(1 Barn. & Cress. 186—191; S. C. 2 Dowl. & Ry. 266; 1 L. J. K. B. 69.)

A. consigned goods for sale to B., the captain of an Indiaman, bound on a voyage to Calcutta, and directed him to invest the proceeds in certain specified articles, or in bills at the exchange of the day. B. sold the goods at Calcutta, and invested the proceeds in sugar, which was not one of the articles specified in his instructions, and informed A. of the purchase by a letter, which the latter received on the 29th May. B. had no commercial establishment in this country, but by a memorandum on a promissory note given by him to A. before he sailed for India, it appeared that one C. had acted as his agent in some insurance transactions. On the 7th August, A. notified to C. that he would not accept the sugars, and advised the latter to insure them. C. declined to interfere, alleging that he had no knowledge of any transactions between A. and B.: Held, upon these facts, in an action brought by A. to recover the proceeds of the goods shipped by him, that the jury were well warranted in finding that A. had assented to the purchase made by B.

ACTION for money had and received, money paid, &c. against the defendant, as surviving partner of one E. H. Coffin. There were counts charging the defendant alone. Plea, non-assumpsit. At the trial, before Abbott, Ch. J., at the London sittings after last Term, the following appeared to be the facts of this case. On the 12th May, 1821, the plaintiff shipped on board the ship *Ajax*, which was then lying in the river Thames, bound for Calcutta, a quantity of cloths and other articles. The defendant Clark was the captain, and Coffin the purser of that vessel. The plaintiff, on the same day, by a letter of instruction, informed Clark and *Coffin that he had consigned the goods to their care, to dispose

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of them at any place they thought best for his interest, and he directed them to invest the proceeds in certain other goods specified in the letter, if they could be procured at prices likely to bear a profit; if not, they were to buy bills at the exchange of the day. The *Ajax* having arrived at Calcutta, Clark and Coffin sold the plaintiff's goods, and with the proceeds purchased 250 hogsheads of Benares sugars, that not being one of the specified articles in which the returns were directed to be made by the letter of instructions. By letter of the 17th January, 1822, the defendant informed the plaintiff of the shipment of the sugars on board the *Fame*, and transmitted a bill of lading, and alleged the low rate of exchange as a reason for purchasing sugars. The plaintiff received this letter on the 29th of May, 1822. In May, 1821, Clark and Coffin had purchased of the plaintiff a quantity of goods, and they gave him in payment their promissory note, dated the 16th May, 1821, for 86*l.*, payable eighteen months after date. There was a memorandum on the note, that the policy of insurance was in the hands of H. Leigh, Esquire, Old South Sea House. Leigh was the brother-in-law of the defendant, and the plaintiff was acquainted with that fact. Clark and Coffin had no commercial establishment in this country. On the 7th August, 1822, the plaintiff's attorney wrote to Mr. Leigh, as the agent of Clark and Coffin, and informed him that the plaintiff declined accepting the sugars, on the ground that Clark and Coffin were not authorised to invest his property in the purchase of sugars, and advising him, Leigh, to insure the sugars, on account of any person who might be interested therein. On the same day, Leigh replied that he *had no knowledge of any goods having been sent to India by the plaintiff, under the care of Clark and Coffin, nor of any shipment of sugars made by them on account of the plaintiff; that he, Leigh, was only their private agent, and that he should not interfere. The *Fame* sailed from Calcutta on the 3rd February, 1822, and was lost on the 14th of June, at the Cape of Good Hope. Intelligence of that event reached London on the 26th August. The defendant Clark afterwards delivered to the plaintiff an account current, in which the proceeds of the plaintiff's goods were admitted to have been 68*l.*, and the costs of the sugars were charged to his account. The LORD CHIEF

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JUSTICE directed the jury that the plaintiff was bound to notify his dissent within a reasonable time to the agent of Clark and Coffin, in this country, if he had any means of doing so; and he left it to them, upon the evidence to find, whether, as the plaintiff knew that Leigh was the brother-in-law of Clark, and that he had certainly been their agent in some insurance transactions, he ought not to have notified his rejection of the sugars to him; and if so, whether, under the circumstances, that dissent was notified in time. The jury having found a verdict for the defendant,

Scarlett now moved for a new trial :

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The only ground upon which it has been held necessary to give notice of dissent to an agent who has deviated from his instructions is this, that the principal may not sustain a prejudice by the want of it. Here, then, the plaintiff was not bound to give any notice of his intention to repudiate the purchase; for Clark and Coffin could not be prejudiced by the want of it, as it did not appear that *they had any agent in England authorised to insure the goods, or that any person receiving the notice would have acted for their benefit. Leigh clearly had no such authority. It was the duty of Clark and Coffin, when they announced the purchase, either to have directed the plaintiff, if he repudiated it, to insure on their account, or to inform him who their agent was. Clark and Coffin had no commercial establishment in England. The evidence was not sufficient to shew that Leigh was their agent, or that there was any other house in England to whom notice ought to have been given.

ABBOTT, Ch. J. :

I am of opinion that there ought not to be a new trial in this case. The plaintiff certainly was not bound to accept the sugars. It was his duty, however, to notify his rejection of them within a reasonable time after he received intelligence of the purchase, if there was any person here to whom that notice could be given.† The jury have found, upon the question

† Cited by CHITTY, J. in *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch. D. 489, 499, 56 L. J. Ch. 1081, 1087.—R. C.

submitted to them, that Leigh was a person to whom notice ought to have been given; and that it was not given within a reasonable time.

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BAYLEY, J. :

I think that there is not any ground for disturbing the verdict in this case. It appears by the evidence, that Coffin and Clark were directed to purchase with the proceeds of the plaintiff's goods certain specified articles, if likely to produce a profit; if not, they were to purchase bills at the exchange of the day. Contrary, however, to their instructions, they purchased with the proceeds of the plaintiff's goods Benares sugar, which was not one of the specified articles. In so doing they might perhaps have acted beneficially for their *employer; but the purchase not being authorised by the principal, it was competent to the latter either to adopt or repudiate the act of the agents. The principal, however, has no right to pause and to wait the fluctuation of the market, in order to ascertain whether the purchase is likely to be beneficial or prejudicial; he is bound, if he dissents, to notify his determination within a reasonable time, provided he has an opportunity of doing so. In this case, the letter announcing the purchase arrived on the 29th May. Assuming that the plaintiff did not know that Coffin and Clark had any general agent in London, it was his duty to make inquiries. It is in evidence, that he knew Leigh to be the brother-in-law of Clark, and he might certainly have learnt from the memorandum on the promissory note in his possession that Leigh had been the agent of Coffin and Clark in some insurance transactions. It did not appear that the plaintiff had any other knowledge upon that subject on the 7th August than that which he possessed upon the 29th May. I am of opinion, that the plaintiff's neglect to make inquiry from the 29th May to the 7th August was evidence to go to the jury, to shew that he acquiesced in the purchase of the sugars made by Coffin and Clark.

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HOLROYD, J. :

I am of opinion that there is no ground for granting a new

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trial. It is true that Coffin and Clark did not conform to the instructions they received, as to investing the proceeds of the plaintiff's goods. Circumstances might possibly exist to justify an agent in not strictly pursuing his instructions. It might possibly be ruinous to his principals to pursue them. Coffin and Clark, in this case, having deviated from their instructions, *gave the plaintiff notice of the purchase which they had made; and the only question is, whether he ever assented to the act done by them, which might or might not in the event turn out to be beneficial. If he did assent, it is quite clear that he cannot succeed in the present action; and if there was reasonable evidence to satisfy the jury that he did assent, the present verdict is right. The letter communicating the purchase of the sugars was received by the plaintiff on the 29th May, and he then, knowing that his instructions had not been pursued, does not give any notice that he dissented from the purchase made on his account, until the 7th August; and it appears, that on the 29th May he had all the information concerning Leigh which he had on the 7th August. On that day he does treat Leigh as the agent of Coffin and Clark. I think, therefore, that the jury might fairly infer, from the facts of this case, that the plaintiff did once assent to take the cargo on his own account, or that he meant at least to take the chance of the market. They might presume that something had happened between the 29th of May and the 7th of August, to alter the intention which he had once formed. I think, therefore, that the verdict was right, even if Leigh turned out not to be authorised to act as the agent of Clark and Coffin.

BEST, J. concurred.

HOLLIS v. GOLDFINCH AND OTHERS.†

(1 Barn. & Cress. 205—223; S. C. 2 Dowl. & Ry. 316; 1 L. J. K. B. 91.)

1823.

Feb. 1.

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By an Act of the 16 & 17 Car. II. certain persons were authorised to make navigable the river Itchin, and certain other rivers, and to cut, dig, and make new channels, and to deepen or widen the rivers, channels, &c. and to do all that might be fit for navigation, and to build locks, &c. upon any of the lands adjoining the rivers, &c. and to make towing-paths; and it was expressly provided that the undertakers of the navigation should not make any trench, river, or water-course, or use the locks, &c. upon the land of any person until a full agreement with, and satisfaction to the owners of the land had been made by the commissioners appointed by the Act, or by the persons authorised to make the navigation, nor until satisfaction should be paid to the respective owners of the lands, according to the determination of the commissioners, or by agreement by the undertakers of the navigation: By a subsequent clause, the commissioners were to determine what satisfaction any person should have in respect of any prejudice, loss, or damage sustained for such proportion of his lands next adjoining to the navigation as should be made use of for the purposes of the Act, in case the undertakers of the navigation should not have agreed beforehand, and satisfied the party so damnified. The proprietor of the navigation having brought trespass against the owner of the adjoining land, for cutting trees upon the bank of a channel made under this Act, the learned Judge at the trial admitted evidence of acts of ownership exercised by the proprietors of the navigation upon other parts of the banks where the adjoining land did not belong to the defendant, and afterwards left the question to the jury, upon conflicting acts of ownership which were given in evidence; but stated, in the course of his address, that it might be assumed from the length of time that had elapsed since the passing of the Act, and from the provision that no land of any person was to be used until satisfaction was made to the owner, that some agreement had been made, by which all the land used for the purposes of the navigation by the proprietors thereof had been sold to them by the land-owners. A rule having been obtained for a new trial, the COURT

Held, first, that by virtue of the provisions of this Act of the 16 & 17 Car. II., the proprietors of the navigation did not necessarily acquire such an interest in the soil in a bank adjoining to and formed out of the earth excavated from a new channel, made for the first time under the Act, as would enable them to maintain trespass.

Secondly, that as the purchase of the soil was not necessary for any of the purposes of the Act, it was to be inferred that no such purchase had actually been made; and that the improbability of any such purchase ought to have been presented to the jury.

Thirdly, that acts of ownership by the proprietor of the navigation upon different parts of the bank contiguous to new channels of the

† Cited and followed in *Lea Con-* App. Cas. 685, 692, 51 L. J. Ch. 17,
servancy Board v. Button (1881) 6 20.—B. C.

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navigation made under the Act of Parliament were not admissible in evidence to shew that the soil in the bank in question belonged to the proprietor of the navigation; and the rule for a new trial was made absolute.

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TRESPASS for breaking and entering plaintiff's close, in the parish of Compton, in the county of Southampton, bounded on the east by a ditch, and on the west by the river Itchin; and cutting down the plaintiff's trees and bushes, and the materials thereof coming, taking, and carrying away, &c. Plea, not guilty. The cause was tried before Park, J. at the last Spring Assizes for the county of Southampton, and the question between the parties was, whether the right of soil in a bank on one side of that part of the river Itchin, called The New Cut, the towing-path being on the other side, was in *the plaintiff or defendant. The bank appeared to have been formed out of the earth excavated from the channel of the navigation. Adjoining to the bank in question, and separated from it by a small ditch, called The Counter-ditch, was Warner's Mead, which belonged to the defendant. On the part of the plaintiff, an Act of Parliament, passed in the 16 & 17 Car. II., was given in evidence, by which it was enacted, "that it should be lawful for Sir Humphrey Bennett, and certain other persons therein named, their heirs or assigns, to make navigable or passable for boats and vessels the river of Itchin, alias Itching, which runneth from Ailsford through Winchester, and certain other rivers therein named, and to cut, dig, and make such and so many new channels to, from, by, or into any or either of them, or to scour, cleanse, deepen, or widen all the said rivers, channels, brooks, or water-courses, and to do all or any other acts as might be fit for navigation, or passing by water to or from all or any of the aforesaid rivers or places where it may be made passable." There then followed a clause authorising them "to build or make, upon any of the lands adjoining the said rivers, in convenient places, locks, weirs, sluices, turnpikes, pens, or dams for water, and ways, passages, and bridges, and to make cranes for wharfs, to alter ways and bridges, and to make towing-paths. And in order that the making all or any of the premises should not be in any ways prejudicial to any persons that have any lands, &c. or weirs, mills, or other profits whatsoever, made use

of for the making the aforesaid premises to the aforesaid rivers, new channels, &c. it was provided, that the undertakers should not dig, cut, carry, or make any trench, river, or watercourse, or use the locks, weirs, pens for water, cranes, and wharfs, or *the passages, ways, bridges, or foot-rails, in or upon the land of any persons, until a full agreement with and satisfaction to the respective owners or occupiers of the lands be had or made by any five of the commissioners appointed by the Act, or by the persons authorised to make the navigation, nor until such recompense or satisfaction should be given or paid to the respective owners of such lands, according to the determination of the commissioners, or agreement made by the persons authorised as aforesaid, unless it be by the consent of the respective owners, or where they should refuse to appear before or submit to the determination and decrees of the commissioners, in which latter case the persons authorised by the Act, their servants or workmen, by the order and approbation of the commissioners, were empowered to cut, dig, or make any river, new river, watercourse, &c. wharfs, &c. and to make, maintain, and use the said locks, weirs, sluices, made or built upon the lands of the persons so refusing, in as full a manner as if the agreement had been made with the owners by the persons so authorised, or as if the owners had submitted to the determination of the commissioners." By a subsequent clause, the justices of peace of the respective counties where any thing was to be done in pursuance of the Act were made commissioners, and any five of them were authorised to examine witnesses upon oath, and when it was made appear to them how and where the river, &c. should be cleansed, cut, digged, or made navigable, or where a new cut was to be made, and where the locks, weirs, sluices, &c. must be built and set up, the commissioners were to determine what satisfaction any persons should have, for or in respect of any prejudice, loss, or damage sustained, for such proportion *of his lands, &c. in or next adjoining to the said navigation, &c. river, &c. as should be made use of for bridges, ways, or passages, or by doing any thing appointed or consented to be done by that Act, in case the undertakers should not have agreed beforehand, and satisfied

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the parties so damnified; and the commissioners were further authorised to hear and determine all controversies, thereafter arising, between any persons touching or concerning any matter relating to the premises, or any part thereof; and their determination was to be binding on all persons: and it was enacted, that their determinations, orders, sentences, and decrees, should be set in writing, under the hands and seals of the commissioners, or any five of them, within six weeks after the first application made to them for that cause, and should be kept amongst the records of the Sessions, by the Custos Rotulorum for the county wherein the determination should be made, and that transcripts thereof should be delivered to the clerks of the peace of the said counties, to be by them kept upon record, amongst the records of their sessions of the said counties, all which should be taken, construed, deemed, and adjudged good and sufficient evidence in any court of record whatever. There was then a proviso, that if the undertakers did not make the river navigable before the 1st of November, 1671, the commissioners might appoint others to do it. The plaintiff having first proved that no transcript of any decree of the commissioners had, after search, been found in the office of the clerk of the peace for the county of Southampton, tendered in evidence a paper, stated to be an award of the commissioners appointed by the Act, which was proved to come out of a chest, containing [*209] *his title-deeds. The learned Judge was of opinion, that it was not admissible in evidence, because it did not come from the custody required in the Act of Parliament. The plaintiff then gave in evidence various acts of ownership exercised by him and the former proprietors of the navigation upon the spot in question, such as cutting the bushes, and using the soil of the bank for making a towing-path; he also proved similar acts of ownership exercised by himself and the former proprietors of the navigation upon other parts of the bank on the side of the new cut, but beyond Warner's meadow. Between the *locus in quo* and some parts of the bank upon which acts of ownership were proved, a part of the ancient channel of the river intervened. This latter evidence was objected to by the defendant, but the learned Judge received it, on the ground, that as the

plaintiff claimed a general right over the bank of the navigation, which might be considered one entire district, the acts done by him or by the other proprietors, in any part, was evidence to explain acts done by him in other parts of the same line. The plaintiff then gave in evidence a lease, bearing date the 8th September, 1750, by which Edward Pyott, the former proprietor of the navigation, demised to R. Goldfinch and others, for 21 years, such a competent quantity of water, flowing in the river Itchin, that lay above a meadow called Compton Mawn,† as should be sufficient, in a proper manner, to water all or any part of the pasture ground, so as it should be taken at a proper time, and in such a convenient quantity, as not to impede the navigation, together with four hatches or sluices, then standing upon the bank of the river, for the more convenient conveying of water from the river *to the pasture ground. The lease reserved a power to the lessor to shut down, draw up, and regulate the hatches, when he deemed it convenient, for all the purposes of the navigation, or for amending or repairing the river, or any of the banks, &c. The lease contained covenants by the lessees to pay a yearly rent of 5*l.*, and to repair the hatches or sluices, so as to keep the water in the river, and to preserve the navigation from being damnified, (the lessor keeping the gates of Compton Mawn lock in good repair,) during the term, and to permit the lessor and his servants, at all times, to open and shut the hatches. There then followed a covenant, that the lessees, at the end of the term should, at their own costs, remove and take away the hatches thereby granted, and amend, repair, and make good, in a substantial manner, the banks of the river where the hatches then stood. This lease expired in 1771, but the defendant paid 5*l.* a-year rent down to the year 1779. It appeared that the plaintiff in 1803, at the request of the defendant, had granted him permission to cut bushes on the bank in question. On the part of the defendant it was proved, that the bushes growing on the bank had been cut by his order, and that about ten or twelve years ago, eight or nine ash poles, there growing, which were seventeen inches round and twenty feet high, were cut down by his orders, and

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† Compton Mawn and Warner's meadow adjoined each other.

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carried away. The learned Judge, in the course of his address to the jury, observed, that as the Act of Car. II. had expressly provided, that the proprietor of the navigation should not use the land of any person, until a full agreement with and satisfaction to the owners thereof had been made, that it might fairly be presumed, considering the length of time that had elapsed, that some agreement had been made between the proprietors of the navigation *on the one part, and the land-owners on the other, by which all the land used for the purposes of the navigation was sold to the proprietors thereof, observing at the same time, that proof of such a deed, unaccompanied with acts of ownership, could have very little weight in the case; and he stated to the jury, that it was a question of fact purely for their consideration, and that it depended upon the user of the place by one side or the other; and he left it to them to find for the plaintiff or defendant, according as they were satisfied, that the acts of user, proved on the one side or the other, were stronger. The jury having found a verdict for the plaintiff,

P. Williams, in last Easter Term, obtained a rule *nisi* for a new trial on two grounds:

The first was, that the learned Judge had directed the jury, that they might presume that the property in soil in the bank in question had vested in the original proprietors of the navigation by private agreement; whereas the Act of Parliament only purported to give them an easement or right of using the soil for the purpose of the navigation; and he cited *Buckeridge v. Ingram*,† where, upon a similar Act of Parliament, the MASTER OF THE ROLLS held, that the soil did not pass to the undertakers of the navigation, but a mere right arising out of the soil. The second ground was, that the learned Judge had received evidence of acts of ownership exercised upon different parts of the bank, and he distinguished this from *Stanley v. White*,‡ where it might be supposed that the whole property within the belt once belonged to the Stanley *family, whereas it was evident in this case, that the property in the soil, if bought at all, must have

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† 2 Ves. jr. 652.

‡ 12 R. R. 544 (14 East, 332).

been bought in separate parcels of the different proprietors of the adjoining land. In *Tyrwhitt v. Wynne*† it was expressly stated, that leases granted by the lord on other parts of a waste, were not admissible to prove that the soil in a particular part of the waste was in the lord, unless it was previously proved that the *locus in quo* formed part of one entire waste to which the leases were applicable.

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Gaselee, Selwyn, E. Lawes, and Poulter, now shewed cause :

The Act of Parliament, which gave to the proprietors the use of the land for the purposes of the navigation, must have intended to give them the property in the soil. An Act passed in the reign of Charles II. ought not to be scanned by rules of criticism derived from the verbose enactments of modern times. *Buckeridge v. Ingram* is an authority to shew that the shares in the river Avon, created by a statute similarly worded, were real property. It is true, that the MASTER OF THE ROLLS intimated an opinion, that the soil did not pass to the proprietors of the navigation, but a right arising out of the soil. But that was a mere extrajudicial opinion. Assuming, however, the soil not to vest in the proprietors of the navigation by the mere operation of the Act itself, it was properly left to the jury to presume an agreement between the original undertakers of the canal and the land owner, by which the property in the bank itself was conveyed to the former. It was clearly competent to those parties to enter into such an agreement; and as the Act itself expressly *provides, that no land should be used for the purposes of the navigation until an agreement with and satisfaction to the land owners had been made by the undertakers of the canal, and as acts of ownership were proved to have been exercised by the latter for a long period of time; it might fairly be inferred, that the land could not have been so used unless an agreement had been made, vesting the soil in the proprietors. It appeared, that the proprietors had granted a lease of hatches upon the bank in question, to the former owner of the adjoining land, and as the hatches belonged to the

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† 21 R. B. 398 (2 B. & Ald. 554).

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proprietors of the navigation, it seems to follow, that the soil in the bank upon which the hatches were placed, must have belonged to them. Secondly, the acts of ownership exercised by the proprietors of the navigation upon different parts of the bank, were admissible to shew that the property in the soil in the bank in question was vested in them. In *Stanley v. White*,† the plaintiff's manor was surrounded on all sides by a belt of land extending fifteen feet beyond a circular hedge, within which belt, the whole of it being more or less wooded, the trees in question had been cut; and it was held, that acts of ownership exercised by the plaintiff or his ancestors on other parts of the belt, were evidence to shew that the trees which had been cut within a particular part of the belt, were the property of the plaintiffs; and Lord ELLENBOROUGH there said, that if lands be held all under one general title throughout one entire district, he saw no objection to receiving acts of ownership in different parts, as evidence of the same right throughout the whole. Now, in this case, the right to the soil as well in the land over which the water *flowed as in the adjoining banks, must have been acquired by the proprietors of the navigation, under the authority of the Act of Parliament in question. The banks of the navigation may, therefore, be considered as one entire district held under a general title by the proprietors of the navigation; and if that be so, the disputed evidence was properly received.

P. Williams (with whom was *Marrett*) *contra*, was stopped by the COURT.

ABBOTT, Ch. J. :

The motion for a new trial was obtained on two grounds. The first was, that improper evidence had been received. The second, that the case was not left to the jury in the way most likely to lead them to a correct conclusion upon the subject. Upon the question as to the admissibility of the evidence received on this occasion, I have not entirely made up my mind. The facts of this case are very different from those proved in *Stanley v. White*, in which case similar evidence was received. There, the obvious presumption to be drawn from the situation

† 12 R. R. 544 (14 East, 332).

of the property was, that all the land within the belt had originally belonged to one and the same person. Now here, if there has been an acquisition of right by the undertakers of this navigation, it must have been made by purchase, not of one proprietor, but of many, no one of whom could be compelled to part with any interest beyond that which the Act of Parliament made it compulsory on him to part with. That is a very important and material distinction between the two cases. Assuming, however, the evidence to have been admissible, and considering it as evidence of ownership only, without reference to the origin of that ownership, it * leaves the question between the parties very much in doubt. The enjoyment of the grass and the herbage was clearly made out to have been in the proprietor of the land; the enjoyment of the trees and bushes principally, perhaps, in the proprietors of the navigation, though that is broken in upon, for there is evidence that the defendant cut some of the trees upon the bank. I think, however, that the point with respect to the origin of the ownership, if any such ever existed, was not so distinctly presented to the jury as it ought to have been. That origin must have been under, although not by virtue of the Act of Parliament. Now it is observable, that there is not one word in the Act denoting purchase or sale, or that the soil is to become vested in the undertakers of the canal. It has been said, that Acts of this kind in the reign of Car. II. were drawn up more concisely than they have been in later times. That probably is true; but it certainly was as easy then, if the Legislature had contemplated a purchase, to have given to the commissioners a power of assessing the price to be paid for the land taken on purchase, as to have put the words into the Act, that they should have the power to say how much and what satisfaction persons should have in respect of any prejudice, loss or damage. Now, if all that the Act gives authority to the undertakers to do, might be accomplished without the purchase of the soil, there is no reason to suppose that the soil would be purchased. It is quite obvious, that the purposes of the Act might be accomplished without the actual purchase of the soil. For it gives no power to purchase the soil of the old rivers, and never contemplated that the under-

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the channel, they would have a right to whatever might be growing on that bank ; but it seems to me, that that is not so. They would be excused from the trespass committed by laying the earth on the adjoining land, because for that they would have made satisfaction ; they would be entitled to use the bank for all the purposes of navigation, but they would have no legal right to have the bank for the purpose of growing any thing upon it. As to the lease given in evidence, I agree in the observations made by my LORD CHIEF JUSTICE. Upon the other point, I incline to think, that the plaintiff was not at liberty to go into evidence of the exercise of acts of ownership on other parts of the bank, but ought to have been confined to evidence of acts done on this particular spot. In all those cases where evidence of acts done in one spot, have been held admissible in order to shew a right in another, a reasonable probability has been previously *made out, that the whole land had been formerly in one owner, and had been all subject to one and the same burden. This was the principle upon which the cases of *Stanley v. White*, and *Tyrwhitt v. Wynne* proceeded. I am not quite satisfied whether the evidence ought to have been received in the former case on the pleadings as they were framed, because I doubt whether the plaintiff ought not in his replication to have stated, that the trees were growing on a certain district constituting one belt, over the whole of which he claimed the same right, and that they were his soil and freehold, because that would have given the defendant to understand that the plaintiff meant to give evidence of that description. Whether that be so or not, the decided cases proceed on the ground of unity of ownership or character between the spot in question and other places, with respect to which the acts of ownership given in evidence are adduced. Now, in the present case, there was no such unity of ownership or character established, for the acts of ownership are exercised on different parts of a bank of a new cut, which, in all probability, passed through the lands of many different persons. It was not necessary, for the purposes of the navigation, that the undertakers should buy the land of any one proprietor. Some might be willing, others unwilling to sell ; and it is not to be inferred, that because nineteen persons in one particular line granted their freehold up to the

water's edge, that the twentieth must have done the same thing. I am of opinion, that evidence of that kind could not be received, unless unity of ownership, or a distinct unity of character, was previously established; and for that reason, if there were no other, it seems to me that there ought to be a new trial.

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HOLBOYD, J. :

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I am clearly of opinion, that the Act of the 16 & 17 Car. II. did not give the right of soil to the proprietors of the canal; it contains no clause compelling the proprietors of land to sell: any purchase, therefore, would be totally independent of the powers given by the Act of Parliament. The Act does compel the proprietors to allow the use of the land through which the river passes, and of the land adjoining, for all purposes useful or beneficial to the navigation. There was no necessity, therefore, for the commissioners to make any compensation or satisfaction, except for such use of the land as the Act empowered them to have; that being the case, the presumption arising out of the powers given by the Act is against their having made any purchase. Now on the trial the Act seems to have been considered as affording grounds to presume that a purchase was actually made; and, for the reasons already given, the lease of the hatches or sluices appears to me to have very little effect. With respect to the evidence of other acts done upon other parts of the bank, the present impression upon my mind is, that such evidence was not admissible, because there was no preliminary evidence to shew, that the whole line of the bank had ever been one property, belonging to one person, or held under one title, before the existence of the navigation; and upon that ground, I incline to think that that evidence ought not to have been received.

BEST, J. :

I am of opinion that the statute of the 16 & 17 Car. II. gives no right to the undertakers of the canal to purchase the soil; it gives a mere easement, a right to make and cut the canal and towing paths, and such other things as are necessary, for the *purposes contemplated by the Act. It has been said, that the

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powers given to the commissioners necessarily imply the right to the soil; because, as the land which is covered by water cannot be used by the former owner of the soil, it gives to the proprietor of the navigation the right of soil. In order to construe this statute, it may be proper to look at the language of other statutes made *in pari materiâ*. Now the 23 Hen. VIII. c. 5, by which authority is granted to the commissioners of sewers to do certain things, is an Act of this description, and the language used is similar to that of the present Act. Although the commissioners of sewers have authority to repair the banks of rivers, yet it is perfectly clear, that they have no property in the soil; and if they make a bank near to a river, the property in the bank is not in them, but in the owner of the soil: Callis, 74. And in the case of *The Duke of Newcastle v. Clark*,† it was held, that they had no property in a wall or dam erected by them across a navigable river, so as to entitle them to maintain trespass. It appears to me, that these are authorities to shew that the proprietors of this navigation have no property either in the soil over which the water flows, or in the adjoining banks. I am also of opinion that the evidence objected to ought not to have been received. The question between the parties in this case was to whom the right of soil in the bank belonged? Now how was that question to be decided? In the first place, by title-deeds, which must clearly relate to the *locus in quo*, or no inference whatever can be drawn from them. If title-deeds cannot be produced, the next best evidence is possession; but then it must be the possession of the *locus in quo*. In this case there was *no evidence of possession. The only other evidence must be acts of ownership: now acts of ownership can only prove that which would be better proved by title-deeds or possession. Acts of ownership, when submitted to, are analogous to admissions or declarations, by the party submitting to them, that the party exercising them has a right so to do, and that he is, therefore, the owner of the property upon which they are exercised. The declaration of A., who is in possession of land, that B. is the owner of that land, is evidence in favour of B. and against A., as to that particular portion of

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† 20 R. B. 583 (8 Taunt. 602; 2 Moore, 666).

land; but it is no evidence that B. is the owner of the adjoining land, which is occupied by another person, unless, indeed, A. and the holders of the adjoining lands all held by one and the same title. Generally speaking, therefore, acts of ownership, submitted to by the holder of one portion of land, cannot be any evidence that the person exercising them has any right to the adjoining land. Besides, one landholder might, from good-nature or other causes, permit acts which others would refuse; or he might lose his rights by negligence. It would be extremely hard, therefore, to construe the implied acknowledgment arising from acts of ownership exercised over the land of A. to be received as evidence of an acknowledgment of a similar right over the land of B., who has never submitted to any acts of the kind. Upon principle, therefore, I am of opinion that this evidence ought not to have been received. In the case of *Stanley v. White* such evidence was received, upon the ground that it was to be presumed that the whole of the property within the belt once belonged to the Stanley family; but there is no ground for any such presumption here. In the case of *Tyrwhitt v. Wynne* it was expressly decided, that acts of ownership exercised upon other parts *of the waste of the manor, were not admissible to prove that a certain portion of common land was the soil and freehold of the lord of the manor, unless it was first established that the *locus in quo* was part of one entire district, honor, or manor, to which those acts were applied. Upon principle, therefore, as well as upon authority, I am of opinion that this evidence ought not to have been received.

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Rule absolute.

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RICKARDS v. BENNETT AND ANOTHER.†

(1 Barn. & Cress. 223—236; S. C. 2 Dowl. & Ry. 389; 1 L. J. K. B. 97.)

Where in an action of trespass the lord of a manor set out various burthens borne by him, and then prescribed, not by reason of those burthens but generally as lord of the manor for a toll upon all goods bought and delivered, or bought elsewhere and brought into and delivered, in a town within the manor, which from time immemorial had been parcel of the manor: Held, after verdict, that this was good as a claim of toll traverse, although the burthens set out did not constitute a sufficient consideration for a toll thorough.

Where a legal commencement of a prescription can be presumed, that, after verdict, is sufficient to support the claim.

TRESPASS for taking a cheese, the property of plaintiff, at Farringdon, in the county of Berks, and converting it to the use of the defendants. There were several pleas, but the only one that proved material was as follows. That before and at the said time when, &c. the said defendant Bennett was and still is seised in his demesne, as of fee, of and in the manor of Farringdon, in the county aforesaid, with the appurtenances, whereof the said town of Farringdon, at the said time when, &c. and from time immemorial, hath been and still is part and parcel; and which town of F., before and at the said time when, &c. was and from time immemorial has been and still is divided into two tithings or townships; and that the said defendant Bennett, and all those whose *estate he now hath, and at the said time when, &c. had, of and in the said manor with the appurtenances, for the time being, from time whereof, &c. have repaired and maintained, and have been used and accustomed, &c. to repair, at their and his proper costs and charges, a certain market-house, a certain blind-house or lock-up house, a certain pound within the said town of F., and divers, to wit, two pair of stocks within the said town of F., so being part and parcel of the said manor as aforesaid, and one-half of a certain bridge called Radcot Bridge, and the pound and stocks within the township of Great Coxwell, and the pound and stocks within the township of Little

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† Commented on in the judgment of the Court delivered by WILLES, J. in *Brecon Markets Co. v. Neath and Brecon Ry. Co.* (1872) L. R. 7 C. P. 555, 567, 41 L. J. C. P. 257, 263, and referred to by BLACKBURN, J. in S. C. in the Ex. Ch. L. R. 8 C. P. 157, 159.—R. C.

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Coxwell, when and as often as need or occasion has been or required, or shall be or require, and to provide and keep in repair, at his and their proper costs and charges, the stalls and stallages used at all and every of the markets and fairs from time to time held within the said town of F., and also to provide and keep in repair, at his and their proper costs and charges, a certain brass bushel measure, for the use and benefit of all persons residing in or resorting to the said town of F., so being part and parcel of the said manor as aforesaid, and having occasion to use the said bushel; and that he the said defendant Bennett, and all those whose estate he now hath, and at the said time when, &c. had, of and in the said manor with the appurtenances, from time whereof, &c. have had, received, and taken, and have been used and accustomed to have, receive, and take, and of right ought to have had, received, and taken, and the said defendant Bennett still of right ought to have, receive, and take, for every ton of hard cheese brought into the said town of F. for sale, and there sold and delivered within the *said town, or bought elsewhere than in the said town, but brought into the said town for the purpose of being delivered, and delivered within the said town, so being within and parcel of the said manor, a certain reasonable toll or duty, that is to say, the sum of 6*d.* for each and every ton of such cheese, and so in proportion for a smaller quantity than a ton, the same being payable and to be paid by the seller of such cheese, after the arrival thereof within the said town of F., and where the same was ready to be delivered, but before the actual delivery thereof, to the purchaser thereof, (except in certain cases not material to be mentioned); and when and as often as the said toll or duty hath been and remained unpaid, after reasonable request and demand thereof made of the seller of the said cheese, if personally present at the delivery thereof, or if the seller should not be present, then, of the person actually delivering such cheese for and on behalf of the seller, the owner of the said manor, by himself and his servants for the time being, from time whereof, &c. have used and been accustomed to distrain, and of right ought, &c. and the said defendant Bennett still of right may distrain a reasonable part of the cheese so brought into the said town, for the purpose of being delivered

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there as aforesaid, and so delivered there as aforesaid, and to keep and detain such distress until the said toll should and shall be satisfied to them. The plea then contained a justification by the defendant Bennett, as lord of the manor, and the other defendant, as his servant, for seizing the cheese in question for non-payment of toll, and stated all the facts necessary to bring the case within the prescription above set out. The replication traversed the prescription, and upon that traverse issue was joined. *At the trial before Garrow, B. at the last Spring Assizes for Berkshire, a verdict was found for the defendant, and in Easter Term last a rule was obtained for entering judgment for the plaintiff, *non obstante veredicto*, on the ground that the plea did not show any sufficient consideration for the toll, and *Truman v. Walgham*† was cited. And now,

W. E. Taunton, Shepherd, and R. B. Comyn shewed cause:

The case of *Truman v. Walgham* is very distinguishable from the present; there the toll was claimed by reason of the defendant's repairing divers streets in the town of Gainsborough, without alleging that the plaintiff's cart passed through those streets. No such definite reason is assigned for the present claim, which is made generally by the lord for goods brought within the manor, and delivered there, and therefore falls within the principle of *James v. Johnson*.‡ And in *Lord Pelham v. Pickersgill*,§ BULLER, J. expressly points out, as a distinction between that case and *Truman v. Walgham*, that in the latter the claim was not made, because the plaintiff had passed over the manor or land of the defendant, but because he had passed along a public street, and it did not appear that the road through that street was repaired by the defendant. There are many other cases collected in *Warrington v. Mosely*,|| which shew that the claim of toll, as disclosed by these pleadings, may be sustained. "In 8 Edw. III. pl. 376, the defendants justified in trespass, for pulling down a fold, as servants to the lady of the manor of Hastings,

† 2 Wils. 296.

‡ 2 Mod. 143.

§ 1 R. R. 348 (1 T. R. 660).

|| 4 Mod. 319.

who, by reason of her seignory, had a freehold *throughout the said vill, so that no other could fold there without her leave ; this extends to strangers as well as to those of the vill, and yet it was held good." So in Dyer,† where the mayor of London sued upon a custom to have of every alien who brought salt into the port of London, one-twentieth part thereof, without shewing any reason or consideration for the claim, judgment was given for the plaintiff. So, where the lord claimed to grind all corn, &c. it was held, that no consideration need be stated.‡ Now here, it is alleged, that the town of Farringdon has, from time immemorial, been a part of the manor of Farringdon, whereof the defendant Bennett is seised in fee, which is sufficient to ground a claim to the toll in question. In *Crispe v. Belwood*,§ the plaintiff brought trespass against the defendant, for taking 120 deal boards of the plaintiff. Defendant justified, for that Sir W. H. is seised in fee of the manor of G., within which manor there is, and time out of mind hath been a wharf, repaired by the lord of the manor, being upon the river Trent ; by reason of which the lord has had a toll of 2*d.* per ton of all merchandises put on land within the manor, (not saying upon the wharf,) and for non-payment to distrain a reasonable part of the goods ; and that the plaintiff put on land within the manor 120 tons of deal boards, and refused to pay the toll, for which the defendant, as servant to Sir W. H. distrained the boards in question. Plaintiff replied *de injuria*, and after verdict, judgment was given for the defendant, and it was held, that landing within the manor was a sufficient consideration for the toll.

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(BEST, J.: The argument *for the defendants in that case, which appears to have been adopted by the Court, is very important for the present defendants ; it is thus stated. "And it may be intended, that all the lands within the manor are demesnes of the manor, for so they were at first, till the lord divided them among his tenants. And supposing that those lands are not now parcel of the demesnes, but given to the tenants in fee, yet the prescription may have a reasonable commencement, viz. that when the lord divided those lands

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† Dyer, 352, b. pl. 27. ‡ F. N. B. 123. § 3 Lev. 424.

RICKARDS among his tenants, he reserved this toll, for landing of goods,
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 BENNETT. to himself.”)

The case of *Smith v. Shepherd*, as reported in Cro. Eliz.† is also in favour of the defendant. But it is not necessary to maintain the propriety of that judgment, for here it is stated, that the defendant Bennett is lord of the manor of Farringdon, that the town of Farringdon is within the manor, and that the goods were brought into the town for the purpose of being delivered there. The present case is, therefore, undistinguishable from *Crispe v. Belwood*, which was confirmed in *Colton v. Smith*.‡ The defendant is not bound to define the nature of the toll, and to claim it either as a toll traverse or toll thorough; the plea shews that the goods were brought into the defendant Bennett's manor; and besides, that a variety of burthens borne by him are set out as considerations for the toll. The claim, however, is general; those considerations alone are not relied upon as the foundation of it; and therefore, although they may be considered insufficient to support the claim, yet still, if sufficient appears without them

[*229] to entitle the lord of the manor *to a toll, the defendants are entitled to judgment, and this rule must be discharged.

Jervis and G. Cross, contra :

The plea should have defined the claim either as a toll traverse or a toll thorough. That, however, has not been done; and the observation made upon the plea in *Truman v. Walgham* is applicable to this case. The Court there said, “The plea is as bad as can be. The lord has artfully tried to make it doubtful, whether this be a toll traverse or a toll thorough; for he has confounded them together: the consideration he claims it for, is for mending the highway, and he would have us believe it is for passing through his own manor or land.” In the present case, the claim upon the face of the plea is of a toll thorough, and therefore cannot be supported, unless a sufficient consideration is shewn. Now here the plaintiff had not the benefit of any one of the considerations stated.

† 710. See S. C., differently reported in Moore, 574.

‡ Cowp. 47.

(HOLROYD, J. : That should have been replied.)

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Then the case of *Truman v. Walgham* is decisive as to the insufficiency of the considerations.

(BAYLEY, J. : There the defendant was fettered by the words "by reason whereof," introduced after the statement that divers streets were repaired by him.)

It is true that those formal words are not to be found in this plea, but various considerations are stated as the ground of the claim ; and if those considerations fail, the prescription is bad.

(BAYLEY, J. : But may not all those considerations be struck out, and the claim be left as a claim generally by the lord of a manor to a toll by prescription ?)

In order to support such a claim, sufficient must be shewn to raise a presumption that a good consideration once existed. Now it is not stated in this *plea that those under whom the defendant claims ever were seised of the demesnes of the manor of F. ; it may be, therefore, that although lords of the manor, yet he and those whose estate he hath never were lords of the soil.

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(BAYLEY, J. : Originally the lords of manors were lords of the soil also, but in progress of time the lands were granted out to their tenants.)

The case of *Crispe v. Belwood* † is the only one in point for the defendant ; and the effect of that is much weakened by what fell from Lord MANSFIELD in *Colton v. Smith*, ‡ which was another cause arising out of the same claim : he there says, "In this case, everybody that pays has a benefit ; for, if they go to the wharf, they have the benefit of it, and if they land their goods elsewhere within the manor, they land upon the plaintiff's private property ; and in 3 Lev. 424, the Court held the consideration good." It is therefore manifest that Lord MANSFIELD thought the validity of the claim depended upon the ownership of the soil. The case of *Lord Pelham v. Pickersgill* § is very distinguishable from the

† 3 Lev. 424.

‡ 1 Cowp. 47.

§ 1 B. R. 348 (1 T. R. 660).

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present; there the jury found, as a fact which was stated on the special verdict, that the ownership of the soil as well as of the manor was in the Crown before the time of legal memory, and that they were not severed until the reign of Car. I.; and in *Lord Pelham v. Haigue*, there cited, the Court of C. P. came to a different decision, the case before them being silent as to the ownership of the soil. There is another important distinction between *Lord Pelham v. Pickersgill* and this case: there it was stated upon the record, that the highway and the toll were coeval, so that it might be *presumed that the grant of the highway was the consideration for the toll. Here that cannot be relied upon, for nothing of the kind is stated; and according to *Truman v. Walgham*, the subject's right to pass along a highway was before all prescriptions. The case of *Lord Pelham v. Pickersgill*, so far from being an authority in favour of the present defendants, recognised and confirmed the general principle that there must be a *quid pro quo* in order to support a claim of toll. The same principle was acted upon in *Smith v. Shepherd*,† *Warrington v. Moseley*,‡ and *Truman v. Walgham*, and is adopted in Com. Dig. Toll (C), and 2 Roll. Abr. 522, Toll (B). Here there is nothing to shew that an equivalent for the burthen sought to be imposed was ever conferred upon the public. The plaintiff is therefore entitled to judgment, notwithstanding the verdict found for the defendant; for if the prescription is bad, the plea does not disclose any sufficient justification in law for the trespass which was committed.

ABBOTT, Ch. J. :

The plea in this case alleges, not only that the manor has existed from time immemorial, but also that the town of Farringdon has from time immemorial been part of the manor. It is, therefore, to be presumed, that before the time of legal memory, the site of the town belonged to the lord. It is also alleged, that the toll has been paid immemorially. We may, therefore, fairly infer, that the toll was originally granted to the lord, in consideration of his consenting that the soil of the manor should be

† Moore, 574.

‡ 4 Mod. 319; S. C. Comb. 295; Holt, 673.

laid out in the streets of *the town. The cases of *Crispe v. Belwood*, *Colton v. Smith*, and *Lord Pelham v. Pickersgill*, prove, that if such a consideration can be presumed, it is sufficient to support the claim made in this case. The objection which existed in *Truman v. Walgham*, and upon which that case was decided, does not apply here. There the plea set out certain considerations for the toll in such a manner as entitled the plaintiff to judgment, if those considerations were insufficient in law to support the claim. Here, although certain considerations are alleged, yet the claim of toll is general, and not by reason of those considerations. Admitting, therefore, that those would be insufficient, yet, if we can fairly infer a legal commencement of this prescription, the defendant is, at all events after verdict, entitled to our judgment.

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BAYLEY, J. :

I am of opinion that the toll claimed is good as a toll traverse. The plea alleges certain special considerations for the claim. It appears, indeed, that the plaintiff is a stranger to those considerations; but the defendant is entitled to succeed upon the ground of others which are not expressly set out, but may fairly be inferred. It is stated, that the defendant † is lord of the manor of Farringdon, and that the town of F. has from time immemorial been part and parcel of the manor. The plea next states certain burthens borne by the lord, and then that the lord and those whose estates he hath, have, from time immemorial, taken the toll in question; not stating that it has been taken by reason of the considerations set out. They are mentioned as it were collaterally, and the claim is made generally by the defendant, Bennett, as lord of the manor, for goods brought into *the town of F., being part of the manor, and therefore, necessarily brought over a part of the manor. Inasmuch, therefore, as there was a time before legal memory when the whole soil of manors belonged to the lords of them, we may presume that this toll was granted at a time when the whole soil of the manor of Farringdon was vested in those under whom the defendant, Bennett, claims. Now judgment ought not to be entered for the plaintiff *non*

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† “Plaintiff” by an obvious error in the report.

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obstante veredicto, unless the prescription as pleaded must necessarily be bad. If a legal commencement of the claim to this toll can be presumed, that is now sufficient, a verdict having been found for the defendants. This toll may fairly be presumed to have been granted at a time when the lord of the manor was also owner of the soil in return for the dedication of a part of that soil to the public. Upon this view of the case, it falls exactly within *Crispe v. Belwood*, *Pelham v. Pickersgill*, and *Colton v. Smith*. The rule must therefore be discharged.

HOLROYD, J.:

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I am also of opinion, that the prescription as pleaded is good in point of law, the objection to it having been made after the jury have found that the prescription exists in fact. It is not a claim for toll for the privilege of going along a highway, but a claim by prescription by a lord of a manor for toll upon goods sold and brought into the manor for delivery. It is not a claim for passing through the manor, but for bringing goods into it and delivering them there. That such a prescription is good, is established by three cases, *James v. Johnson*, *Crispe v. Belwood*, and *Colton v. Smith*, and in those cases the consideration was not co-extensive with the claim. In the last two *the consideration was repairing a wharf within a manor, and the claim was of toll upon all goods landed upon the wharf or elsewhere within the manor. In the cases where a claim of toll for going along a highway was held bad, no sufficient consideration was stated for abridging the subject's right of passing free along a highway. It was therefore necessary, in order to establish the claim in those cases, to shew that the highway did not exist before the toll. In the case of *The Mayor of Nottingham v. Lambert*,† a prescription to take toll for passing on an ancient navigable river through the plaintiff's manor, was held bad; but WILLES, Ch. J., in delivering the judgment of the Court, distinguishes that case from those which are relied upon as in point with the present. It seems to me, therefore, that in this case a sufficient consideration is implied. It does not appear by the record whether the goods were brought along a highway or

† Willes, 111.

not; that is not stated in the plea, and it should have been replied by the plaintiff, if he intended thereby to shew that the toll claimed was a toll thorough, according to the case of *James v. Johnson*.

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BEST, J.:

The distinction between the two descriptions of toll is well given in a note to Fitzherbert's *Natura Brevium*, 227. "Toll thorough is in the highway, but toll traverse is for passing over another's ground." In the latter case, the use of the soil is a sufficient consideration for the toll, and it is not necessary to state any other in support of a claim to it. But in the former, it is in a highway; that is, where the proprietor had a right of passage before the grant of toll; and, therefore, the *claimant must shew that something is done by him beneficial to the person against whom he makes the claim. This distinction is also taken by Lord Chief Justice WILLES in the case of *The Mayor of Nottingham v. Lambert*. It does not appear in this case, that the plaintiff could derive any benefit from any one of the things which the defendant states he is bound to do, therefore, this toll cannot be supported as a toll thorough. In *Colton v. Smith*, the consideration stated was not sufficient to support a toll thorough; but, as it was alleged that the claimant was lord of a manor, and that the goods were landed within the manor, that was holden sufficient to support the toll as a toll traverse. So, in this case, we may reject all the considerations set out to support a toll thorough, and say, still there is enough to support the toll as a toll traverse. The plea alleges, that the cheese was brought from some other place into the defendant's manor to be there delivered. It does not state that it was carried over the defendant's lands so as to make the case exactly like that of *Lord Pelham v. Pickersgill*, but enough is shewn to raise a presumption, that at the time when the toll was granted, the land over which the cheese was carried was the defendant's land, and that is sufficient, after verdict, to establish the possibility of the legal commencement of the toll, and therefore to support the prescription. In the cases of *Lord Pelham v. Pickersgill*, *Colton v. Smith*, *Crispe v. Belwood*, and *James v. Johnson*, the

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land over which the road passed did not belong to the party who claimed the toll at the time of the claim. In *Crispe v. Belwood* it was argued at the Bar, and the argument was adopted by the Court, that by shewing that the party claiming the toll was lord of the manor, a presumption was *raised, that at the time when the toll was established, such party was owner of the soil, because all the soil within the ambit of the manor in ancient times belonged to the lord. This, I believe, was historically true, and, although the lord has parted with his soil over which the road passes, he may have reserved to himself the toll that was paid for the use of the road, and then the toll traverse had a legal commencement. The case of *Truman v. Walgham* has been cited, in which it is reported that the Court said, that the toll could not be supported, because it went to deprive the subject of his common right and inheritance to pass through the King's highway, which right of passage was before all prescriptions, and Moore, 574, is referred to, where this doctrine is certainly to be found. But in the same case, as reported in Cro. Eliz. 710, this appears to have been the opinion of POPHAM, Ch. J. only, and GAUDY and CLENCH, JJ., say in respect as it might have a lawful beginning, it is well enough without shewing it. It is not true that public roads must have preceded all prescription. Public roads are created every day by new dedication of ways to the public use. These are either absolute or qualified dedications, as on payment of toll, or having a right to keep gates across them. In *Lord Pelham v. Pickersgill*, BULLER, J. considered the prescriptive and public right as coeval. For these reasons I think that the plea is good, and consequently, that this rule must be discharged.

Rule discharged.

BALDWIN AND OTHERS v. RICHARDSON AND
ANOTHER.†

(1 Barn. & Cress. 245—247; S. C. 2 Dowl. & Ry. 285.)

1823.
Jan. 27.
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Where the traveller of A., a tradesman, received in the course of business a promissory note, which he delivered to his master without indorsing it, and the note having been returned to A. dishonoured, the latter not knowing the address of the next preceding indorser, wrote to his traveller, who was then absent from home, to inquire respecting it: Held, that A. was not guilty of laches, although several days elapsed before he received an answer and gave notice to the next party, as he had used due diligence in ascertaining his address.

ASSUMPSIT by the indorsee against the indorser of a promissory note. Plea, the general issue. Upon the trial before Abbott, Ch. J., at the Guildhall sittings after last Term, it appeared in evidence that the note was indorsed by the defendants to the plaintiffs; and that it was afterwards, with the indorsement of the latter upon it, delivered by their traveller to the traveller of one E. Waller of Luton, in Bedfordshire, who delivered it to his master, but did not endorse it. E. W. paid it into the hands of the Bedford bankers, who transmitted it to their correspondents in London. The note became due on the third of April, and was dishonoured. E. W. received notice of the dishonour on the 6th of April, to which no objection was made; but not knowing from whom his traveller received the note, wrote to him, then at Edinburgh, upon the subject. The letter reached Edinburgh on the 10th, and the traveller immediately wrote to the plaintiffs in London. The plaintiffs, on the receipt of that letter on the 14th of April, wrote to E. W., desiring him to forward the note to them, which he did; and on the 16th of April they sent notice of the dishonour to the defendants. Upon these facts, it was contended for the defendants that they were discharged by the laches of E. W., who suffered so long a time to elapse between receiving and giving notice of the dishonour of the note. The LORD CHIEF JUSTICE thought *that due diligence had been exercised, and the plaintiff had a verdict. And now,

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Denman moved for a new trial, and contended that E. W.

† See now Bills of Exchange Act (1882) s. 50 (1).—R. C.

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RICHARDSON. must, for the purposes of this case, be taken to have known the residence of the next preceding indorser : that knowledge being within his reach, inasmuch as his traveller, who received the note, would doubtless know of whom he took it. And if E. W. disabled himself from giving due notice to the preceding indorser, by neglecting to inform himself of his address, that is a species of negligence for which he must be equally responsible as if he had known the address but had neglected to give notice. If the contrary should be determined, it would be difficult to put any limit to the time allowed for inquiries ; for, if the holder of the note might send to Edinburgh for information, why might he not by the same rule send to any far more distant place ? The case of *Bateman v. Joseph*† may be distinguished from the present : there it did not appear that the plaintiff could have obtained earlier information as to the defendant's place of residence ; here, E. W. must be considered as identified with his servant who received the note, and to have had all the information which was in the possession of the latter.

Per CURIAM :

If we yielded to this application, we should be laying down a new rule respecting the notice to be given of the dishonour of bills of exchange and promissory notes, which would tend to restrain the circulation of those instruments : an effect which
[*247] ought *certainly to be avoided. The general rule upon this point is, that each party must give notice as soon as he reasonably can. Now had this note been received by E. W. in payment of a debt, from a person who did not indorse it, all that is required by the law of merchants would be satisfied by inquiring in due time of that person from whom he received it, and sending notice accordingly. The circumstance of the note having been received by the traveller of E. W. cannot make any substantial difference. There is not, therefore, any ground for disturbing the verdict in this case.

Rule refused.

† 11 B. R. 443 ; (12 East, 433 ; 2 Camp. 461).

PITAM *v.* B. FOSTER AND JOHN NORRIS, AND
MARY HIS WIFE.†

(1 Barn. & Cress. 248—253; S. C. 2 Dowl. & Ry. 363; 1 L. J. K. B. 81.)

Where an action was brought against A. and B., and C. his wife, upon a joint promissory note, made by A. and C. before her marriage, and the promise was laid by A. and C. before her marriage, and defendants pleaded the Statute of Limitations, whereupon issue was joined: Held, that an acknowledgment of the note by A. within six years, but after the intermarriage of B. and C., was not evidence to support the issue.

ASSUMPSIT on a promissory note made in 1814, by Foster and Mary Norris, *dum sola*, payable on demand, and delivered by them to the plaintiff, laying the promise to pay it by Foster and Mary, *dum sola*. There were also the common money counts, in which the promises were laid in the same manner. Plea, *actio non accrevit infra sex annos*: issue thereon. At the trial before Holroyd, J. at the last Summer Assizes for Northamptonshire, it appeared in evidence that the note was made more than six years before the action was brought, and that Mary Norris had been married more than six years before that time. The plaintiff relied upon an acknowledgment of the debt made by Foster within six years. It was objected for the defendants, that the evidence of such an acknowledgment was not admissible, the promises being laid by Foster and Mary, *dum sola*. HOLROYD, J. received the evidence, and left it to the jury to say, whether they believed it; and a verdict having been found for the plaintiff, he gave the defendants leave to move to enter a nonsuit. A rule was obtained accordingly in the last Term; against which,

Reader and Adams now shewed cause:

The allegation that the promise was made by Mary Norris *dum sola*, was perfectly immaterial. It can only be considered as a promise stated to have been made before a particular time; which is of no importance here, the acknowledgment by the other joint-maker of the note having taken the case out of the Statute of Limitations.

† Cited and applied in judgment of the Court of Appeal delivered by LINDLEY, L. J. in *Beck v. Pierce* (1889) 23 Q. B. Div. 316, 322; 58 L. J. Q. B. 516, 518.—R. C.

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(BAYLEY, J. : In an action by an executor upon promises made to the testator, evidence of a promise to the executor will not support the issue.)

That case is very different. There the party might be misled in his defence, which could not happen here.

(ABBOTT, Ch. J. : There is this difficulty ; a promise by the wife after marriage would not be available ; now she, having been married more than six years, pleads the Statute of Limitations.)

If that be conclusive, then in all cases where a feme joint-maker of a promissory note marries, that circumstance is after six years, a complete bar to any action on the note, unless the husband acknowledges it. The case of *Whitcomb v. Whiting*† certainly does not entirely solve the difficulty, but it shews strongly the effect of an acknowledgment by one of several makers of a note. There the note was joint and several ; and it was held, that an acknowledgment by one not sued, bound another party sued alone upon the note. Here, it is true that the husband, who is not a party to the note, will be affected by the promise ; but when he married, he took his wife with all her legal liabilities. If she had remained sole, she would now have been liable to be sued : if she survives her husband, she may be rendered liable by an acknowledgment by Foster. There does not then appear *to be any sufficient reason to say that the action shall be barred in the interim.

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Marriott, contra :

It cannot be disputed, that a promise by one of several joint contractors takes a case out of the Statute of Limitations as to the others ; but it is equally clear, that the implied promise laid against the others must be stated to have been made at a time when they were capable of making an express promise. (He was then stopped by the Court.)

ABBOTT, Ch. J. :

This question depends upon the form of the promise laid in

† 2 Doug. 652.

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the declaration ; that is not immaterial, because a promise made by the wife after marriage would not be available. Then the question is, whether an acknowledgment made within six years operates as a new substantive promise, or draws down the original promise to the time when the acknowledgment is made. In *Hurst v. Parker*† Lord ELLENBOROUGH says, that in actions of assumpsit an acknowledgment of the debt is evidence of a fresh promise. If that be not so, but on the contrary the acknowledgment is to have the effect of drawing down the original promise, then in an action by an executor upon promises made to the testator, evidence of a promise made to the executor would support the issue. But the reverse of this proposition was decided in *Green v. Crane*.‡ That was an action of assumpsit by an executor, upon promises to the testator. Defendant pleaded non-assumpsit *infra sex annos* ; and upon evidence it appeared, that after the death of the testator, and after six years from *the time of the contract, defendant acknowledged the debt to the executor, and promised to pay it. HOLT, Ch. J. delivered the resolution of the Court, and said that they were all of opinion that the action could not be maintained, the promise being made to the executor, and so out of the issue. That case was followed by several others of the same kind, which it is unnecessary to mention. The last was in the Court of Common Pleas, *Ward v. Hunter* : § that was an action by an executrix, on promises made to the testator ; plea, Statute of Limitations. Plaintiff relied upon defendant's having said to her that the testator always promised not to distress him for the money. The plaintiff having obtained a verdict, a motion was made to enter a non-suit ; and the Court said, when the Courts determined that an acknowledgment is evidence of a new promise then made, it must be of a promise made by a person competent to make it, and to a person who is in existence to receive it ; and the rule for a non-suit was made absolute. That case was determined at a time when Lord Chief Justice GIBBS presided in the Common Pleas, than whom no Judge was ever more perfectly acquainted with the rules of pleading. It is not necessary to go through the

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† 18 B. R. at p. 441 (1 B. & Ald. 93).

§ 6 Taunt. 210.

‡ 2 Ld. Raym. 1101.

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other cases ; those which have been already mentioned satisfy me that the statement of a promise by the wife before marriage is not an immaterial allegation. The marriage of a woman who is one of several joint-makers of a note may create great difficulties in suing ; but when such difficulties occur, they must arise from the fault of the holder of the note in not enforcing payment before the six years have expired.

[252] BAYLEY, J. :

This was an action on a joint promise made by a man and a woman before her marriage. The plea was, that the cause of action did not accrue within six years, upon which issue was joined. The marriage of the woman took place more than six years before the action was brought, and the evidence to take the case out of the statute was of a promise by the man, made after the marriage of the feme. But the declaration being upon a promise before the marriage, the evidence did not sustain the issue. There was a case decided in Trinity Term, 1818, *Munton v. Sculthorpe*, similar in principle to those cited by my LORD CHIEF JUSTICE. The whole of them clearly shew, that the promises relied upon in this case were not parcel of the issue, and, therefore, could not be any answer to the plea of the Statute of Limitations.

HOLROYD, J. :

I am of opinion that there was no evidence to take this case out of the Statute of Limitations applicable to the issue upon the record. The declaration does not state a promise by all the defendants, but by Foster and Mary Norris, before her marriage. Now that would not be satisfied by evidence of a promise by Foster and John Norris, the husband, made after the marriage and a promise by the wife after marriage would not be binding. The issue is whether the cause of action accrued within six years ; and it appeared that the wife had been married more than six years before the action was brought, so that there could not have been a promise by the wife *dum sola*, within six years, as the declaration alleged : that alone would be decisive, inde-

pendent of the cases of *Green v. Crane* and *Ward v. Hunter*, which are in point.

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v.
FOSTER.

BEST, J. :

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The case of *Ward v. Hunter* is decisive of the present question : the wife could not have made a promise within the six years ; and, therefore, no one else could make a binding promise for her.

Rule absolute.

EX PARTE KRANS AND OTHERS.†

1823.
Feb. 7.

(1 Barn. & Cress. 258—262 ; S. C. 2 Dowl. & Ry. 411.)

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Where persons detained, without any warrant, on board one of his Majesty's ships of war, on a charge of smuggling, and on suspicion of murder, were brought up by writs of *habeas corpus*, and it appeared by the return to those writs, and to a *certiorari* which issued at the same time, that the prisoners might be guilty of the offences imputed to them, the COURT refused to discharge them out of custody, and committed them to the custody of the marshal ; in order that they might be taken before some competent authority to be examined touching the matters contained in the returns, and to be further dealt with according to law.

ON a former day in this Term, writs of *habeas corpus* had been obtained, directed to W. M'Culloch, the captain of his Majesty's ship *Severn*, commanding him to bring up the bodies of Krans, and 21 other persons confined on board the said ship, and at the same time a writ of *certiorari* was issued to the Mayor of Dover, to remove into this Court any proceedings which had been taken before him connected with the detention of the parties. On this day 21 of the prisoners were brought up, and the following return to the writs of *habeas corpus* was read : " I, W. M'Culloch, &c. do humbly certify to this honourable Court,‡ that before the issuing of the annexed writs of *habeas corpus* to me, that is to say, on the 18th day of January, 1823, the several persons mentioned in the said writs were brought on board his Majesty's said ship *Severn*, in the Downs, by the directions of Henry

† Cited and applied, *R. v. Mount* (1875) L. R. 6 P. C. 283, 305, 44 L. J. P. C. 58, 65 ; and in *Ex parte Terraz* (1878) 4 Ex. D. 63, 67, 48

L. J. Q. B. 214, 218.—R. C.

‡ The usual form is, " To the court of our lord the King, before the King himself."

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Nager, lieutenant in his Majesty's Navy, and having the command of the *Badger* revenue cutter, and left there for safe custody, until an opportunity should occur of taking them safe to London, to be there dealt with according to law; having been *captured in a smuggling cutter, after an engagement with the said cutter *Badger*, on the high seas by the said H. Nager, the said smuggling cutter being then and there laden with half ankers of spirits and other contraband goods: and on suspicion of the murder of W. Cullum, a deputed mariner of the said revenue cutter, *Badger*: whose bodies, all but one (namely, A. V., who was too ill to be moved at the time of the coming of the said writs to me, and who has since died,) I have ready, as by the said writs I am commanded."

To the *certiorari*, two coroners' inquests were returned, one held upon the body of W. Cullum, and the other upon the bodies of three persons killed on board the smuggling cutter. In the former, the verdict was wilful murder against some person or persons unknown; and, in the latter, justifiable homicide. The depositions of the witnesses examined before the coroner were also returned. The several matters returned to the writs of *habeas corpus* and *certiorari* having been read,

Brougham and *Platt* contended, that they were insufficient to warrant the further detention of the prisoners. No evidence at all has been produced to connect these men with the transactions mentioned in the returns and the depositions before the coroner. The coroner's jury returned a verdict of murder against some person or persons unknown, and there is nothing at all to shew that these men were in any way implicated in the offence. Even if any of them had been identified, and the verdict had been returned against them, the coroner must have issued his warrant, and then there would have been a legal custody.

[*260] (BAYLEY, J.: The question is, whether, if there be anything to connect *these men with the offence, the Court must dismiss them, or send them before a magistrate who may investigate the charge.)

The Court certainly has held upon a return to a *habeas corpus*, that where a warrant was defective, still if the Court were put in possession of the facts by the depositions returned, they might amend the warrant and recommit the prisoner, *Rex v. Marks*;† but there the individual was identified, and the only question was, whether a statutory offence had been committed. So, in *Rex v. Shebbeare*,‡ the defendant being brought up by *habeas corpus*, was committed to the custody of the marshal, but in that case, a warrant had been granted for the original commitment. There is no instance where the Court have interfered to the extent now proposed. Here, the parties have never been legally in custody, or even if the detention was legal at the commencement, it has become illegal by its unreasonable continuation. The parties had been detained from the 13th to the 27th of January, when these writs issued, without any attempt being made to take them before a magistrate for examination. If such an imprisonment is to be sanctioned, it might in like manner be protracted for two or three years. In that case the Court would surely discharge the prisoners; and here the delay, being without sufficient cause, is equally illegal.

Ex parte
KEANE.

ABBOTT, Ch. J. :

My opinion in this case is founded upon the return to the *habeas corpus*, and upon that alone. I advert to the proceedings before the coroner, merely for the purpose of shewing that they confirm the *return in one important particular; viz. that W. Cullum has been murdered. There is nothing in the depositions to shew, that there may not exist a case in which these parties may have committed the crime. If we saw that they could not be guilty, then our decision might be different. It has been said, that this is a novel proceeding. I certainly do not recollect any instance of a writ of *habeas corpus* to bring up persons who were in custody for inquiry only, and if we could see that these persons are unlawfully in custody, we must discharge them. But nothing of that kind appears. It is lawful for any person to take into custody a man charged with felony,

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† 6 R. R. 577 (3 East, 157).

‡ 1 Burr. 460.

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KRANS.

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and keep him until he can be taken before a magistrate. It is contended, however, that the time during which the prisoners have been detained is unreasonable, and an extreme case is put to shew the hardship that may arise if any unnecessary detention be sanctioned. The detention without inquiry may continue so long as to induce us to think, that the original cause of it could not be valid, or worthy of any further investigation, and then we should think it our duty to discharge the prisoners. That is the only way in which a detention for an unreasonable time could affect our judgment. Here, we cannot even say that any unreasonable time has elapsed since the prisoners were taken into custody. They were captured on the high seas, and placed for security on board one of his Majesty's ships of war. Their numbers are considerable, and they were taken as smugglers. It is not at all times safe to land so many persons of such a description. In this instance too, it was thought fit that they should be brought to London, there to be dealt with according to law. In as much then, as we cannot say that the *time of the detention has been unreasonable, and the original cause of detainer was a lawful one, viz. the suspicion of murder, we ought not now to discharge the prisoners. It appears to me that our proper course is, not to inquire into the facts of the case, whatever may be our power, but to commit the prisoners to the custody of the Marshal of the Marshalsea, that they may afterwards be taken before a magistrate, who may investigate the charge brought against them.

The other Judges concurring, the following Rule was pronounced by the Court :

“That the prisoners be committed to the custody of the Marshal of the Marshalsea of this Court, in order that they may respectively be taken at the first convenient opportunity before some competent authority to be examined, touching the matters contained in the return to the writs of *habeas corpus* and *certiorari* respectively, and to be further dealt with according to law.”

IN THE MATTER OF BOWER.

(1 Barn. & Cress. 264; S. C. 1 L. J. K. B. 110.)

Personal knowledge of an award and rule of court, makes the party liable to an attachment for not performing the award, although he has not been personally served.

APPLICATION for an attachment against Ralph and John Bower, for not performing award. The only question was, whether the service of the award and rule of court was sufficient. It appeared, that Ralph Bower having a dispute with John Bower as to the award, had personally served John with the award and rule of court in the regular form. Subsequently, other parties made a demand on Ralph and John to perform another part of the same award, but there was no second personal service of the award and rule. After hearing *Campbell* in support of the rule, and *Scarlett* and *Chitty* *contra*, the Court held, that as personal knowledge of the award and rule of court was brought home to both Ralph and John, it was sufficient, and was equivalent to a personal service on them in the ordinary form.

Rule absolute for attachment.

THE KING v. ROGIER AND HUMPHREY.†

(1 Barn. & Cress. 272—275; S. C. 2 Dowl. & Ry. 431. †)

The keeping of a common gaming-house, and for lucre and gain, unlawfully causing and procuring divers idle and evil-disposed persons to frequent and come to play together at a game called "Rouge et Noir," and permitting the said idle and evil-disposed persons to remain playing at the said game for divers large and excessive sums of money, is an indictable offence at common law.

Semble. That an indictment would be good merely charging the defendant with keeping a common gaming-house. Per HOLROYD, J.

THIS was an indictment against the defendants, and charged, that they unlawfully did keep and maintain a certain common gaming-house; and in the said common gaming-house, for lucre

† Cited by HAWKINS, J. in *Jenks v. Turpin* (1884) 13 Q. B. D. 505, 515; 53 L. J. M. C. 161, 166.—R. C.

‡ The learned reporter of *Oaks v. Turpin* in the Law Reports says this is the better report (13 Q. B. D. at

p. 515, note 1). It is rather fuller, and gives the judgment of ABBOTT, Ch. J. in different language and arrangement, but I can see no reason for thinking it more accurate.—F.P.

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and gain, unlawfully and wilfully did cause and procure divers idle and evil-disposed persons to frequent and come to play together, at a certain unlawful game at cards, called "Rouge et Noir;" and in the said common gaming-house, unlawfully and wilfully did permit and suffer the said idle and evil-disposed persons to be and remain playing and gaming at the said unlawful game, called "Rouge et Noir," for divers large and excessive sums of money, to the great damage and common nuisance of all the liege subjects of our lord the King. Plea, not guilty. A verdict having been found against the defendants,

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Curwood and Platt now moved to arrest the judgment :

The keeping of a common gaming-house is not an offence at common law. It is not necessarily a nuisance, but may, like a play-house, become so, if it draw together such numbers of people as to become inconvenient to the places adjacent. In Hawkins's Pleas of the Crown, book 1, c. 75, s. 6, 7th edit., there is this passage: "Also it has been said, that all common stages for rope-dancers, and also all common gaming-houses, are nuisances in the eye of the law, not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons; which cannot but be very inconvenient to the neighbourhood." In Chetwynd's edition of Burn's Justice† and Russell on Crimes,‡ it is laid down generally, that they are nuisances; but the passage in Hawkins is the authority relied upon, and that by no means speaks of it as a decided point, for his expression is, "It has been said, &c." Nor does this indictment shew that any inconvenience had accrued to the neighbourhood, by numbers of disorderly persons collected together; and, therefore, it does not come within the reason, in respect of which Hawkins states, that it had been said, that a gaming-house was a nuisance. At common law gaming is not any offence. In *Bell v. The Bishop of Norwich*,§ it was held, that it was not sufficient cause for a Bishop to refuse to admit a presentee to a living, that he was a haunter of taverns and unlawful games. Besides, the Legislature have, by different statutes, 38 Hen. VIII. c. 9, ss. 11

† Vol. ii. p. 582.

‡ p. 433.

§ Dyer, 254 b.

and 12, 12 Geo. II. c. 28, ss. 2 and 3, 13 Geo. II. c. 19, s. 9, and 18 Geo. II. c. 34, ss. 1 and 2, declared certain specified games to be unlawful, and Rouge et Noir is not one of them; and, in several of these *statutes, royal palaces, during the residence of the sovereign, are exempted from the operation of the acts. Now, if gaming were an offence at common law, the Legislature would not have given such a sanction to the commission of that offence, by exempting persons residing in the royal palaces from the penalties imposed by statutes. Inasmuch then as gaming is not, *per se*, an offence at common law, and the game of Rouge et Noir has not been declared illegal by the Legislature, this indictment is bad, and the judgment must be arrested.

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ABBOTT, Ch. J. :

I have no doubt that the facts stated in this indictment constitute an offence at common law. Hawkins, in the passage which has been cited, observes, " It has been said that common gaming-houses are nuisances in the eye of the law ; " and then he assigns the reason, viz. that they tend to produce certain evil consequences, which is not very different from saying that they are nuisances if those consequences are produced. Since his time many parties have been convicted upon indictments, in which the keeping of such a house has been charged to be an offence at common law. If any confirmation of the authority of Hawkins were wanting, it is to be found in the enactments of the Legislature. The 25 Geo. II. c. 36, s. 5, after reciting, that, in order to encourage prosecutions against persons keeping bawdy-houses, gaming-houses, or other disorderly houses, enacts, That if any two inhabitants of any parish give notice in writing to a constable, of any person keeping a bawdy-house, gaming-house, or any other disorderly house, the constable shall go with such inhabitants to a justice of the peace, and shall, upon such inhabitants making oath that they believe the contents of the notice to be true, enter into a recognisance to *prosecute such offence, and the constable is to be allowed the expenses of the prosecution, and each of the inhabitants is to receive 10*l*. And section 8 recites, That by reason of many subtle and crafty contrivances of persons keeping bawdy-houses, gaming-houses,

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or other disorderly houses, it is difficult to prove who is the real owner or keeper thereof, by which means many notorious offenders have escaped punishment; and then enacts, That any person who shall appear, act, or behave himself as master, or as the person having the care or management of any such house, shall be deemed to be the keeper thereof, and shall be liable to be prosecuted as such, although he be not the real owner. These provisions are a legislative declaration, that the keeping of a gaming-house is an indictable offence. Besides, the 9 Anne, c. 14, s. 2,† makes playing at any game unlawful, if more than 10*l.* shall be lost. Now in this case the indictment states, not only that the defendants kept a common gaming-house, but that they permitted persons to play there for divers large and excessive sums of money. The playing for large and excessive sums of money would of itself make any game unlawful; and if so, there can be no doubt that this is an offence at common law.

BAYLEY, HOLROYD, and BEST, JJ., concurred, and HOLROYD, J. further added, that in his opinion it would have been sufficient, merely to have alleged, that the defendants kept a common gaming-house.

Rule refused.‡

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BERRY v. PRATT.§

(1 Barn. & Cress. 276—277; S. C. 1 L. J. K. B. 116; nom.
Anonymous, 2 Dowl. & Ry. 424.)

Where a seafaring man remained in this country in order to give evidence in a cause: Held, that on taxation of costs, the Master was justified in allowing him a subsistence from the service of the writ until the trial.

In this cause a witness had been detained in England for some months, in order to give evidence. The Master, on taxation of

† Repealed 8 & 9 Vict. c. 109, s. 15.

‡ In *Rex v. Dixon*, 10 Mod. 336, it was held that the keeping of a gaming-house was an offence at common law as a nuisance. In *Rex v. Mason*, Leach's C. C. p. 548, GROSE, J. seemed to be of opinion, that the keeping of

a common gaming-house might be described generally. See also 2 Hawk. P. C., c. 25, s. 59.

§ Cited and followed by Dr. LUSHINGTON in *The Bahia* (1865) L. R. 1 A. & E. 16: and see B. S. C. Ord. 65, r. 27 (9).

costs, allowed him a subsistence from the service of the writ until the trial. The witness was an Englishman, but master of a ship. He resided during the whole time in his own house, but remained in England, in order to give evidence; he would otherwise have been at sea, pursuing his usual avocations.

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Marryat moved that the Master might be directed to review his taxation. This is very different from the case of a foreigner brought over for the purpose of giving evidence.

(ABBOTT, Ch. J. : In *Sturdy v. Andrews*† the witness was not brought over from abroad.)

No case has decided that the witness is to be allowed his expenses during the time that he is residing in his own house.

Per CURIAM :

Upon principle, the Master was justified in allowing the subsistence-money in question. Although the witness was an Englishman, yet he was a sea-faring man; and, unless detained for the purpose of giving evidence, might again have gone to sea, and then the parties might have been put to a far greater expense by the postponement of the trial, on account of his absence. *There would also have been some danger of his evidence being altogether lost by the various casualties to which sea-faring men are exposed.

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Rule refused.

† 4 Taunt. 697.

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DOE, ON THE DEMISE OF THOMAS HENRY
PLAYER *v.* NICHOLLS.

(1 Barn. & Cress. 336—344; S. C. 2 Dowl. & Ry. 480 (L. J. K. B. 124.)

A testator devised to trustees, in trust for his only son, all his freehold and copyhold lands, *to be transferred* to him as soon as he should attain to twenty-one years of age; and in case he should die before he attained to the age of twenty-one years, then to A. B., his heirs and assigns: Held, that the trustees took in the copyhold lands an estate for years, determinable on the son's attaining the age of twenty-one years, or by his death before that period.

EJECTMENT to recover certain copyhold premises in the parish of Aldenham, in the county of Herts, held of the manor of Aldenham. The lessor of the plaintiff claimed them as heir-at-law of his father, Thomas Gregory Player, deceased, who was the only child and heir-at-law of Perry Player, esquire, deceased. At the trial before Wood, B. at the Hertford Summer Assizes, 1821, a verdict was found for the lessor of the plaintiff, subject to the opinion of the Court on the following case:

Perry Player purchased the said copyholds held of the manor of Aldenham, and he also, at the same time, purchased certain freehold premises in the same parish of Dinah Darby; and on the 8th of August, 1769, the said Dinah Darby, out of Court, surrendered the said copyhold premises into the hands of the lord by the acceptance of Thomas Needham, esquire, his steward, to the use of Perry Player, his heirs and assigns for ever. The surrender was presented and inrolled at a Court held on the 12th October, 1769; and at a Court held on the 30th November, 1769, Perry Player was admitted on the surrender, by his attorney, to the premises comprised therein, to hold the said premises to the said Perry Player, his heirs and assigns for ever. And at the same Court Perry Player, by his attorney, surrendered the premises into the hands of the lord, to the uses of his last will. Perry Player died in November, 1785, without
*having made any other surrender of the said premises, and by his will, duly made, executed, and attested, devised as follows: "I give to W. Reade, W. May, and Ann Lowe, in trust for my only son, Thomas Gregory Player, all the rest and residue of all my goods and chattels, and also my freehold and copyhold lands,

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which I have surrendered to the use of my will; likewise all my leasehold and lifehold estates, situated, lying, and being in the county of Hertford, and all other my effects, of what kind or nature soever, the same to be *transferred* to him as soon as he shall attain to 21 years of age. But in case he should die before he attain to the age of 21 years, then I give to my cousin W. Player, his heirs and assigns, all my freehold and copyhold lands, and the tithes thereof, lying at Aldenham, in the county of Hertford. And I hereby nominate and constitute the said W. Reade, W. May, and Ann Lowe, executors and trustees of this my will." Perry Player died, leaving the said T. G. Player his only surviving child, and his will was proved in the Prerogative Court of Canterbury on the 12th November, 1785, by Ann Lowe only, the two other executors having renounced. At the Manor Court, held on the 16th day of January, 1786, it was presented by the homage that Perry Player had died seised of the said premises. And at another Court, held on the 4th December, 1786, Ann Lowe was, on the presentment of the death of Perry Player, admitted by her attorney to the said premises; to hold the said premises with their appurtenances, to the said Ann Lowe, upon the trusts of the said will of Perry Player, at the will of the lord, &c. Ann Lowe died in July, 1794, leaving W. Reade, and W. May, her surviving. Thomas Gregory Player attained the age of 21 *years on the 24th October, 1793, and at a Court held on the 20th October, 1794, (being during the lives of the said W. Reade and W. May,) was admitted to the premises by attorney on a presentment that Ann Lowe was dead; and that he, T. G. Player, had attained the age of 21 years, to hold the same to him, the said T. G. Player, his heirs and assigns for ever. W. Reade died in January, 1801, and W. May died in May, 1809, leaving his great nephew, W. May Lander, who is now living, and an infant of the age of 18 years or thereabouts, his heir-at-law. No surrender or release from W. Reade, W. May, and Ann Lowe, or either of them, or from the heir of either of them, to the said Thomas Gregory Player, is recorded on the Court rolls of the said manor either before or since the admission of the said T. G. Player. The latter died on the 24th March, 1818, leaving the lessor of

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the plaintiff, his eldest son and heir-at-law, him surviving. The question argued was, whether the legal estate was in the heir-at-law of the surviving trustee, or in the lessor of the plaintiff.

Rayley for the plaintiff:

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An estate in fee vested in T. G. Player upon his attaining the age of 21 years, and he having died seised of that estate, it descended to the lessor of the plaintiff. The trustees took, under the will of Perry Player, an estate determinable on the son's attaining the age of 21 years. By the devise to the trustees, the testator only intended to place his property under their control for a limited time, to manage the estates during the minority of his son. He gave no benefit whatever to the trustees, nor does he create any fund for the payment of debts, or for any other purpose. The object of giving his property to the trustees, being *for the management of it during his son's minority, of itself affords a presumption that he only intended to give them a term till his son attained 21. The testator had both the legal and equitable title, and he obviously intended that his son, when he attained to 21, should have both the legal and equitable interest, and the only question as to the copyholds is, whether the son was to take them by his title of heir upon the expiration of a term given to the trustees, or by a conveyance of the fee from them. Now if the testator, after the words "to be transferred to him as soon as he shall attain to 21 years of age," had added, "and when, and as soon as he shall attain to 21 years of age, then I give to my son, T. G. Player, &c.;" it is clear, that the son in that case would have taken the vested fee at his father's death by descent, and not under the will. But a devise to the heir is wholly void. In *Ellis v. Smith*,† Lord HARDWICKE doubted whether a will devising all the testator's estates to his heir could be made available, even for the collateral purpose of revoking a prior will devising the estates from the heir; the testator having executed the last will according to the fifth and not the sixth section of the Statute

† 1 Ves. jr. 11, 17.

of Frauds. In *Boulton's* case,† “One devised lands to his wife till his son should attain the age of 21 years, and then that his son should have the land to him and his heirs, and if he should die without issue before his said age, then to his daughter; this was held a good executory devise to the daughter.” Mr. Fearne observes upon that case, “the first devise of the fee was to the son, who was the heir, and therefore, under the doctrine in *Boraston's* case,‡ the son taking *the vested fee, would still have taken by descent and not by the devise, so that the immediate fee must be considered as undisposed of by the will.” The question here is not what the testator has given to his son, but what he has taken away; whether the words “to be transferred,” can be interpreted to indicate an intention in the testator to give the trustees a fee, and thereby to effect the legal disinherison of his son. He never takes away the beneficial interest from his son; even during the continuance of the estate in the trustees, that circumstance cannot affect the question of the legal disinherison, for this Court cannot look at equities: *Doe v. Vernon*.§ The question here is one of disinherison, and the heir is not to be disinherited even where the case is doubtful: *Gardiner v. Sheldon*.|| If, therefore, it appears even doubtful, whether the testator intended to give the trustees more than a term, the lessor of the plaintiff will be entitled to recover. It may be argued, that the interest given to the trustees was not limited till the testator's son attained 21, but that they were to have a continual legal estate which they were to transfer to him at that age. The whole sentence, however, is evidently one conception of the testator's mind. It does not terminate till the testator has named a finite period, at which he intended that the interest given to the trustees should determine. It is immaterial whether the testator fixed that period at the beginning or at the end of the sentence, whether he gave it to them for eight years only, or during the minority of his son, or whether having given it to them indefinitely, he made the ending of the term certain by directing them to deliver up the *estates at

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† Egerton, cited in Palmer, 132.

‡ 3 Co. Rep. 19.

§ 7 East, 23, 3 Smith, 8.

|| Vaughan, 262.

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a finite period of time. In the *Bishop of Bath's* case† it is said, that every lease for years ought to have a certain beginning, but that is to be intended when it is to take effect in interest or possession, and then the commencement ought to be certain; so also the continuance of it ought to be certain, but that is to be intended either when the term is made certain by express numbering of years, or by reference to a certainty, or by reducing it to certainty by matter *ex post facto*, or by construction in law by express limitation;” and the same doctrine is laid down in *Boraston's* case.‡ Besides it is a general rule, that the legal estate in the trustees should be carried only as far as was necessary to effectuate the purposes of the will: *Doe v. Barthrop*.§ Now, all the purposes of the trust might be effected by the trustees taking an estate determinable on the son's attaining to the age of 21.

Abraham, contra :

The trustees under the will of Perry Player took an estate in fee. If an estate is devised to trustees in trust, to sell or mortgage in order to raise money for the payment of debts, and subject thereto in trust for a third person, the trustees take the legal estate in fee. For otherwise it would not be in their power to execute the trust: *Bagshaw v. Spencer*.|| Now here the trustees are required to do an act to which the seisin and possession of the legal estate is necessary at the time the son attains the age of 21 years. For they are then to transfer the estate to him in the mode required by law viz., by surrender of the legal interest then remaining in them. Here the trustees may be *considered as admitted tenants of the legal estate. For one of them, Ann Lowe, was admitted, and the admission of one joint tenant is the admission of all: *Roe v. Hutton*.¶

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(HOLROYD, J. : The copyhold lands are devised to the trustees, and the copyhold lands are to be transferred. Now, a surrender

† 6 Co. Rep. 35.

|| 1 Ves. 142.

‡ 3 Co. Rep. 19.

¶ 2 Wils. 162.

§ 15 R. R. 530 (5 Taunt 382;

1 Marsh. 90).

is necessary to transfer the legal estate, but is not necessary to transfer the lands. No act is, therefore, required to be done by the trustees here, which they could not do if they took only an estate for a term.)

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Here, an equitable estate in fee is devised to the cestui que trust, and in the event of T. G. Player's dying under 21, the legal fee is devised to another person. *Purefoy v. Rogers*† and *Marshall v. Hill*‡ are authorities to shew that the testator must have intended the cestui que trust to take an equitable estate in fee, and his trustees a legal estate commensurate with his equitable estate, viz. an estate in fee.

BAYLEY, J. :

It may be laid down as a general rule, that where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer, and therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it. *Doe v. Simpson*,§ and *Doe v. Timins*,|| are authorities upon that point. The question, therefore, in this case is, what estate was necessary to enable the trustees to execute the purposes of the trust created by the will. *By the terms of the will, they are to be trustees for the son, to whom the estate is to be transferred when he attains the age of 21. The usual mode of transferring a copyhold estate is, that the person having the estate surrenders it to the lord, and suffers another person to be admitted as tenant on the rolls. If the trustees in this case took an estate in fee, it would be necessary for them to make an actual surrender of the estate, in order that it might pass from them to the surrenderee. If, however, the estate limited to them be determinable as soon as the object of the testator's bounty attain the age of 21 years, his admittance on the Court rolls would operate as a transfer of the estate. It would not then be necessary that there should be a transfer of any interest from the trustees to him, in consequence

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† 2 Saund. 380.

§ 5 East, 162, 1 Smith, 383.

‡ 15 R. R. 367 (2 M. & S. 608).

|| 1 B. & Ald. 530.

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of the determination of the trust estate at that period, and his admittance would be sufficient to satisfy the words "to be transferred." It seems to me, therefore, that the purposes of the will might be fully effectuated, if the trustees took an estate determinable when the son attained the age of 21 years. In the cases cited by the defendant's counsel, the trustees were to take the rents and profits in order to raise money by sale and mortgage for the payment of debts, and they could not in that case have had the means of executing the trust, unless they had the fee. Here, all the purposes of the trust might be answered by the trustees taking an estate determinable on the son's attaining the age of 21; and that being so, I am of opinion that they took an estate determinable at that period, and consequently, that the legal estate at the commencement of the action was vested in the lessor of the plaintiff.

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HOLROYD, J.:

I am of opinion that the trustees took an estate determinable on T. G. Player's attaining the age of 21 years, or by his death before that period. The object of the testator was to give to them the estate in trust for the son, until he should attain the age of 21 years. There are no words in the will which give them any estate beyond the time during which the trust was to be performed, and then the case falls within the general rule already mentioned, that a trust estate is not to continue beyond the period required by the purposes of the trust. That being so, the estate of the trustees ought not to continue in this case after the son attained the age of 21 years, for the lands are then to be transferred to him. It has been said that the trustees are to transfer the estate, and that the seisin and possession of the legal estate is necessary, in order to transfer it to the cestui que trust when he comes of age. But they are not to transfer the legal estate, but the copyhold lands. A surrender may be necessary to transfer the legal estate, but copyhold lands may be transferred without any surrender. I consider the words "to be transferred," to mean, that as soon as the son shall attain the age of 21 years, the copyhold lands are to be delivered up to him. I am very clearly of opinion, that the trustees had no legal interest in the

copyholds in question after T. G. Player attained the age of 21 years, and consequently, that the lessor of the plaintiff is entitled to recover.

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BEST, J. concurred.

Judgment for the plaintiff.

BODENHAM v. PRITCHARD.†

(1 Barn. & Cress. 350—357; S. C. 2 Dowl. & Ry. 508; 1 L. J. K. B. 131.)

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A. being the owner of an estate called D., with a mansion house upon it, in which he resided, purchased an adjoining estate, and occupied a part of it himself, together with the D. estate, having removed some of the fences by which they had been separated; and afterwards devised to his widow for life “all and singular his mansion-house in which he then lived called D., together with all buildings and lands thereunto belonging, as then enjoyed by him; and after her decease, all his said mansion-house called D., with the lands thereto belonging, with the appurtenances, to his godson J. S. B., his heirs and assigns for ever:” Held, that the widow took an estate for life in that part of the newly-purchased estate which the testator occupied himself, as well as in the old D. estate; and that J. S. B. took a remainder in fee in all that was given to the widow for life.

TROVER for a quantity of timber trees. Plea, the general issue. At the trial before Park, J., at the Hereford Lent Assizes, 1821, a verdict was found for the plaintiff for the damages in the declaration, subject to a reference as to the value of the trees, and subject to the opinion of this Court upon the following case. *The plaintiff is devisee under the will of the late John Pritchard of Dollyvelling, in the county of Radnor; and the defendant is the widow of the said J. P., whose will, dated the 16th of September, 1814, contained the following devise: “I give and devise all and every part of my real estates of which I shall die possessed, of every nature and kind whatsoever, and wheresoever, with all and every their appurtenances thereunto belonging, unto F. Bodenham, of, &c. and Charles Meredith, of, &c. to hold to them, their heirs and assigns, to and for the several uses, intents, and purposes hereinafter limited, expressed, and declared of and concerning the same. To the intent and purpose, that the said

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† Cited in judgment of ERLE, C.J., 1 Q. B. 156, 161, 35 L. J., Q. B. in *Polden v. Bastard* (1865) L. R. 96.—R. C.

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F. Bodenham and C. Meredith do permit and suffer my wife, E. Pritchard, to have, hold, and enjoy all and singular my mansion-house in which I now live, called Dollyvellin, in the several parishes of Hersop and Llangunllo, in the said county of Radnor, together with all the buildings and lands thereunto belonging as now enjoyed by me, with all the appurtenances for and during the term of her natural life; and from and after her decease, then I give and devise all my said mansion-house, called Dollyvellin, with the lands thereto belonging, with the appurtenances, unto my godson John Shearwood Bodenham (the plaintiff), son of the late J. Bodenham, of, &c. and his heirs and assigns for ever; and as to all the rest of my said real estates which I may die possessed of, I give and devise the same and every part thereof unto my said wife, E. P., her heirs and assigns for ever, she, my said wife, paying and discharging all the several annuities or yearly rent-charges out of the same; and also, she my said wife, paying and discharging all the several legacies hereinafter in this my will mentioned *out of the said estates, if my personal estates should prove insufficient." The testator died in September, 1814, and the defendant became possessed of the premises so devised to her as above stated, and is now in possession thereof. The testator purchased the Dollyvellin estate in 1772, and occupied it to the time of his death, and in 1792 he purchased the Upper Hall estate close adjoining. At the termination of the then existing lease, about two years after the purchase in 1792, the testator took three pieces of land, all of which had formed part of the Upper Hall farm, into his own possession, and continued to occupy them with the Dollyvellin estate till the time of his death. Some of the fences were removed which separated those pieces of land from the old Dollyvellin estate, and a gate was opened from one of them into the garden belonging to Dollyvellin mansion-house. The rest of the Upper Hall estate, with the exception of the above-mentioned pieces so taken into his own hands, was, to the time of the testator's death, leased out to other tenants. The estate which the testator so occupied was called Dollyvellin, as it was always called before; the new fields added did not alter the name; there was no alteration of the names after Pritchard

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purchased, and a witness on the part of the defendant who had known the premises for 50 years, said, that he never understood Dollyvellin as comprehending any more after the union than before. Two meadows (part of the lands in question) were called Dollyvellin meadows when they belonged to the Upper Hall estate, and they are so called to this time. The defendant, since the death of the testator, has cut down and converted a quantity of timber, growing partly upon the old Dollyvellin estate *and partly upon the several pieces of land above mentioned, as having been part of the Upper Hall estate, and since the purchase in 1792 occupied by the testator himself in the manner above described. The value of the timber so cut and converted is submitted to the decision of an arbitrator, and a verdict having been found for the plaintiff, subject to such reference, is either to stand for the whole amount of the timber felled, or to be reduced according to the opinion of the Court, as to the timber growing upon the pieces so taken from the Upper Hall estate as above stated.

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Puller for the plaintiff:

The real question for the consideration of the Court is, whether those lands which once formed part of the Upper Hall estate, but were afterwards occupied by the testator, together with Dollyvellin mansion-house, passed by the first part of his will, and not by the residuary clause. For if they did so pass, the defendant took only an estate for life, and the remainder in fee being given to the plaintiff, he is entitled to recover the value of the timber which has been felled upon those lands. The words of the will are, that the trustees "do permit and suffer my wife, E. Pritchard, to have, hold, and enjoy all and singular my mansion-house in which I now live, called Dollyvellin, in the several parishes of Heyop and Llangunllo, in the said county of Radnor, together with all the buildings and lands thereunto belonging, as now enjoyed by me, with all the appurtenances for and during the term of her natural life, &c."

(BAYLEY, J.: Was there sufficient belonging to Dollyvellin to

BODENHAM satisfy the word "lands," without including any part of the
 PRITCHARD. Upper Hall estate?)

[*354] There certainly was, but the *former part of the devise must be construed by the words "as now enjoyed by me." That expression makes it perfectly clear, that the testator intended to give his widow a life-estate in all that he had connected in enjoyment with the mansion-house at Dollyvelling. And immediately after the devise to the wife, the will proceeds, "And from and after her decease, then I give and devise all my said mansion-house called Dollyvelling, with all the lands thereunto belonging, with the appurtenances, to my godson J. S. Bodenham;" which clearly shews that the testator meant, that his godson should take in fee all that he had before given to his widow for life.

Campbell, contra :

None of the fields which had belonged to the Upper Hall estate passed to the plaintiff, but those only which belonged to the mansion-house of Dollyvelling. The words of the devise to the widow are, "to have, hold, &c. all my mansion-house, &c. together with all the buildings and lands thereunto belonging." If the devise had stopped there, clearly no part of the Upper Hall estate would have passed; the mere occupation of these fields by the testator would not have affected the question. The fact of there being other fields belonging to the Dollyvelling estate, sufficient to satisfy the word "lands," is decisive; for if there be such, then it is not competent for a person claiming more to introduce evidence that more was intended to pass. The words, "as enjoyed by me," do not extend the operation of the devise, they merely refer to the words before used, "lands thereunto belonging;" and in order to make the fields in question pass the jury should have found, that at the time when

[*355] the will was *made, they did belong to the Dollyvelling mansion-house. There is not a single circumstance in favour of the plaintiff, except the mere occupation of these fields by the testator; for the removal of the fences by no means proves that he intended to annex them to the mansion-house of Dollyvelling.

Puller, in reply, was stopped by the Court.

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BAYLEY, J :

If the intention of the testator be free from doubt, then we must give effect to it, if that can be done consistently with the fair import of the words which he has used. Here the testator was owner in fee of two estates, Dollyvelling and the Upper Hall. Having lived for many years at Dollyvelling, in 1792 he purchased the Upper Hall estate, which comes close up to the Dollyvelling mansion-house. It appears that a gate was opened from the garden into one of the Upper Hall fields, and he removed the fences which formerly separated several of the fields belonging to the Upper Hall estate, from those belonging to Dollyvelling. At the time of the testator's death, all the premises so united were in his own occupation. The rest of the Upper Hall estate was not occupied by him, but was let to various tenants. Under these circumstances he devises to his wife "all and singular his mansion-house, in which he then lived, called Dollyvelling, together with all the buildings and lands thereunto belonging." It has been argued, that if the devise had stopped there, it would have passed nothing more than those lands which were connected in title with Dollyvelling mansion-house: but then the testator adds, "as now enjoyed by me." Now what is the fair import of those words? It is, that the *widow should have for her life all that had been connected in enjoyment by the testator's own act, and not merely that which was connected in title with the mansion-house of Dollyvelling; and his intention to give her all that is quite manifest. In questions of this nature, if the will gives two media of construction, it is not necessary that both should be applicable; if one of them be applicable, and the intention of the testator corresponds with it, that must prevail. Here, then, the words "as now enjoyed by me" furnish a medium of construction with which the intention of the testator clearly corresponds. But the words "thereunto belonging," which give the other medium, may also be considered applicable, for those words may, in their popular and more comprehensive sense, include all that was united in occupation, although not con-

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BODENHAM v. PRITCHARD. nected in title with the old Dollyvelling estate. The subsequent clause, devising to J. S. Bodenham, has not the words "as enjoyed by me;" but the testator having before explained what he meant by the words "thereunto belonging," the plaintiff would take a fee in all that was given to the widow for life, and is, therefore, entitled to the value of all the timber felled by the tenant for life.

HOLROYD, J. :

I am of opinion that all the lands in question passed by this devise. It is not a devise of the testator's "Dollyvelling estate," or "Dollyvelling lands," but of "his mansion-house called Dollyvelling, together with all lands, &c. thereunto belonging, with the appurtenances, as enjoyed by him." The latter words make it quite clear, but independently of them, the lands in [*357] dispute would in common parlance be considered as belonging to the mansion-house of Dollyvelling.

BEST, J. :

It is quite manifest that the testator intended that his godson, J. S. Bodenham, should take a remainder in fee in all that his widow was to have for her life; and it is equally clear that she was to have a life-estate in the lands in question, without resorting to all the different parts of the will in order to discover that intention, which, I think, cannot properly be done. The words certainly give a description large enough to include all that had been occupied, together with the mansion-house at Dollyvelling, without the aid of the expression "as enjoyed by me." The real question is, what did the testator consider as belonging to Dollyvelling? not what was thought by others. He had united certain fields to it in occupation; and, therefore, when he afterwards describes the estate as lands belonging to Dollyvelling, he must have meant to include both the old estate and that which he had added to it. This certainly is the popular sense of the words. Suppose he had taken some fields from one farm and added them to another, surely he would afterwards have spoken of them as part of that farm to

which they had been added. The plaintiff is, therefore, entitled to the value of all the timber felled.

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Verdict to stand for the value of all the timber.

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1823.

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(1 Barn. & Cress. 375—389; S. C. 2 Dowl. & Ry. 634.)

Firs and larches planted with oaks for the purpose of sheltering the latter, and cut from time to time, as the oaks grew larger and required more space, but when once cut not growing again, and some of them yielding a profit by sale, are not “saleable underwoods” within the 43 Eliz.‡ the primary object of planting them being to protect the oaks, and not to derive a profit from them *per se* by sale. *Semble*, that they are not underwood at all.

UPON an appeal of R. R. Milnes, Esq., against a rate or assessment made for the relief of the poor of the township of Ferrybridge in the West Riding of Yorkshire, the Sessions ordered the rate to be amended by striking out a portion of the rate assessed upon the appellant, amounting to 16*l.* 16*s.* 10*d.*, in respect of his woods and plantations, subject to the opinion of this Court on the following case :

The appellant is the occupier of 650 acres of land in Ferrybridge. It appeared in evidence, that in the years 1785 and 1786, 940 acres of the said land were planted with oak and ash closely intermixed with Scotch firs and larches. At different periods, portions of the firs and larches were cut down for the purpose of thinning the plantations, and some of these thinnings were sold under the name of fir and larch poles, but the greater part were used in the erection of buildings. Considerable thinnings of the firs and larches have been made within the last four years, and produced a profit; many of them were of the height of from 30 to 40 feet, and contain from 10 to 12 cubic

† Followed in *Fitzhardinge v. Pritchett* (1867) L. R. 2 Q. B. 135, 142; 36 L. J. M. C. 49, 52.—R. C.

‡ The law as to rating in respect of land used for a plantation or wood,

as well as “saleable underwood,” is altered by 37 & 38 Vict. c. 54; but the case may still be important in regard to the interpretation of the terms in question.—R. C.

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feet of wood, and were 30 years old. This wood is cut without reference to size, in order to allow room for the ashes and oaks to spread. The purpose of introducing firs and larches into those plantations being to keep the same thick and sheltered, and to make a profit by cutting the firs and larches from time to time, when the oaks and ashes by *reason of their growth require more space. Fifteen years ago, 18 other acres of the said land were planted in a like manner; and five years ago, 17 other acres of the said land were also planted in a like manner. The 18 acres have been thinned by cutting out a portion of the firs and larches, but no profit was derived by such thinning. The 17 acres have not yet been thinned. The roots or boles of the firs and larches which are cut, die in the ground and produce no shoots. The whole of the land so planted hath been always rated to the relief of the poor.

E. Alderson (and *Bland* was with him), in support of the order of Sessions :

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The firs and larches mentioned in this case are not saleable underwood within the meaning of the statute of Elizabeth. In *Rex v. The Inhabitants of Mirfield*,† saleable underwoods are thus defined, viz. such as are intended or destined for sale, in contradistinction to such as are to supply the land with estovers for fuel and other purposes of the estate. Sale, therefore, must be the primary object of planting them. Now, here the primary object was not to derive a profit by sale, but in order to serve as a protection to the young oaks and ashes. They were planted for the express purpose of bringing forward those trees which were afterwards to become timber. Nor were they managed as underwood, which, according to *Aubrey v. Fisher*,‡ is another criterion by which the Court may be guided. For it appears that they were cut not with reference to the state of their own growth, but to that of the other trees, and in order to *give them additional room when necessary. If, however, they had been managed as saleable underwood, and with a view to profit, those cuttings would have taken place at stated periods, and standard trees would have been left at certain distances. This seems to

† 10 East, 219.

‡ 10 East, 446.

have been founded on the statute 35 Hen. VIII. c. 17,† made perpetual by the 13 Eliz. c. 25,† which prescribes the manner in which coppice woods or underwoods should be managed. And throughout that Act the Legislature is particularly careful as to the preservation of the springs from which the underwood is to be renewed. It should seem, therefore, to follow, that when they speak of underwoods, they have reference to wood of a renewable nature. And this is confirmed by observing the other subjects of rate in the 43 Elizabeth, which are all of a nature producing a certain annual profit.

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(BAYLEY, J. : Coal mines are included.)

That may, perhaps, be, if strictly considered, an exception and the only one to the observation. Yet coal mines are the only mines which when once opened, continue to produce a profit nearly certain and annual, and exposed to little risk and hazard, which has been assigned in the books as one of the reasons why they were made subject to the rate. Now, these trees produce no certain or annual profit. They are cut down at uncertain and varying periods, according as the growth of the oaks and ashes is more or less luxuriant. This raises another difficulty. In what mode are they to be rated? According to *Rex v. Mirfield*, saleable underwoods are rateable annually and not in the year when cut. That may be possible where the periods of cutting are definite and certain; but if, as here, they be indefinite and uncertain, how will it be possible to ascertain the quantum of the rate?

He was then stopped by the Court.

Milner, contra :

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These firs and larches are saleable underwood within the statute of Elizabeth. That statute ought to be construed so as to make as much property as possible rateable to the relief of the poor. Firs and larches are clearly not timber, and if not, they must be underwood; for that term is synonymous with *sylva cedua*. The statute 45 Ed. III. c. 8, recites, that “at the complaint of the said great men and commons, shewing by their petition,

† Repealed as to E. 7 & 8 Geo. IV., c. 27.

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that whereas they sell their great wood of the age of 20 years, 30 years, 40 years, or of greater age to merchants to their own profit, or in aid of the King in his wars; parsons and vicars of holy church do emplead and draw the said merchants in the Spiritual Court for the tithes of the said wood, in the name of this word called the *silva cædua*, whereby they cannot sell their woods, . . . to the great damage, &c.;" and then enacts, that a prohibition shall be granted as to *gros bois*.† Lord Coke, 2 Inst. 643, says, that before the statute tithes were claimed of *subbois*, under the name of *silva cædua*, but not of *hautbois*, or great wood; and states, that the word *grosse bois* signifies, specially such wood as hath been, or is either by the common law or the custom of the country, timber; for the Act extendeth not to other woods that have not been, or will not serve for timber, though they be of the greatness or bigness of timber. It appears, therefore, that all wood which is not timber, either by the common law or by the custom of the country, is titheable, and comes, therefore, under the description of *silva cædua*, or underwood. Now by the common law, oak, ash, and elm, only are timber. By the custom of particular places, other trees, such as *beech, aspin, and horse chestnut are also timber. If tithes be claimed of any of these latter trees, it is a question of fact whether they be timber by the custom of the country: *Walton v. Tryon*.‡ It is not the use it is put to that makes it timber or not timber: *Rex v. Minchinhampton*.§ In *Goodall v. Perkins*,|| alder polls, though of trees above 20 years standing, were held not to be timber, but titheable; and in *Turner v. Smith*,¶ stub oak and ash, above 30 years old, which were not accounted timber in the county of Essex, were held to be titheable. It is observable, that in *Aubrey v. Fisher*,†† GROSE, J. only speaks of saleable underwood and timber. In Chambers's Cyclopædia and Jacob's Law Dictionary, underwood is described to be coppice or any wood not accounted timber. The Sessions have not found that these were timber by the custom of the country, and they

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† See the note to this statute, 1 Gwillim, p. 5.

‡ 2 Gwill. 827.

§ 3 Burr. 1308.

|| 2 Gwill. 543.

¶ Ibid. 529.

†† 10 East, 446.

are not timber by the common law. These were not, therefore, timber, and if so, they are underwood, and having produced a profit to the owner by sale, they must be considered saleable underwood.†

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BAYLEY, J. :

The statute of the 43 Eliz. does not throw the charge of main- [*380]

(†) The question, as to the meaning of the term “underwood,” has arisen incidentally in actions of waste brought by the reversioner against tenant for life or years: and in the older cases, the question of waste, or not, as to cutting of wood, seem to turn generally on the point whether the wood was or was not seasonable, that is, whether by common law or particular custom the usage was to cut it periodically. In 40 Ed. III. 25, pl. 31, in writ of waste, plaintiff counted that waste had been committed of hazels and of oaks, and as to all (except the hazels). *Belknap*: No waste committed; and as to them, he said they were growing in a park under great oaks, and were seasonable to cut, and prayed judgment if that was to be adjudged waste. *Kirton*: We tell you, that there is a quarter of the wood in which waste is assigned, and in that quarter no oaks grow, nor any other *gros bois* besides hazels; and he has there committed waste, and we pray that he may be attainted of waste committed. *Belknap*: Since you do not deny that they are seasonable to cut and fell at the end of seven years, we are entitled to judgment; for waste is in that which is cut and will not grow again; but with regard to underwood, at the end of seven years it will be as good as it was at the time of cutting, and that can never be adjudged waste there, where from all time it has been seasonable to fell before the end of seven years or ten years. THORPE,

Ch. J.: You who have an estate for term of life cannot allege title of prescription that it is not waste. FINCHDEN, J. to the same effect: He has said that there were no *gros trees* growing in that quarter, *et sil y ad, ad un quart cressant, ou certain quantity de bois, quel bois q. ce. soit, vois faites waste, si vous abat.* WINCHINGHAM, J.: If underwood is seasonable before the end of nine years, tenant in dower or tenant for term of life may fell; and this was adjourned, therefore *quære*, &c. In 42 Ed. III. 6, pl. 19, waste brought against a man, and it was charged that he had cut underwood from year to year, so that they could not grow to be sold. *Candish*: As to the underwood, you see that he counted that we cut the underwood when the cutting of underwood cannot be adjudged to be waste. *Belknap*: As to the underwood, from the moment he does not deny the cutting, we demand judgment, &c. *Candish*: If he had counted that we had grubbed up the underwood, then this would have been good cause to have an action, because they could not grow afterwards: but not so for merely cutting, because they will grow again. In 50 Ed. III. 10, “By these words, *silva cædua*, is to be understood every manner of wood which can be cut down and will grow again. Per BELKNAP, Ch. J.: And in 7 Hen. VI. 38, waste alleged in cutting down and selling certain ashes. Plea, that they were seasonable wood to

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taining the poor on the occupiers of every species of property, but only on the *occupiers of property of certain particular descriptions there specified, and amongst others it speaks of the occupiers of saleable underwoods. The Legislature does not

cut from 10 years to 10 years, and were cut for house-bote and heybote, Replication that they were gross of the age of nine years, and able for gross timber. Rejoinder, that they were seasonable, and cut in seasonable time for house-bote and heybote, without this, that they were gross and able for timber. And in 11 Hen. VI. 1, pl. 3, waste alleged in cutting down oaks. Plea, that they were seasonable wood, and that all the wood growing within the wood in question, had been from all time used to be cut at the age of 20 years and within, as seasonable wood. The opinion of the whole Court was, that the defendant could not justify cutting them as seasonable wood, if he said they were of the age of 20 years, for if they are past the age of 20 years, they are no longer seasonable wood. Upon which plaintiff *replied, that they were past the age of 20 years at the time of the cutting, and defendant rejoined that they were within that age. In the course of the argument MARTIN, J. said, that which is called high wood (*haut bois*) in some places, in other places is only seasonable wood and underwood, and contra, according as there is plenty of wood: for if there is great plenty of wood, great (*graund*) oaks of the age of 20 and under, is used to be cut as seasonable wood; but where there is a scarcity of wood, it is not the custom to cut it as seasonable wood, therefore, if it have not been used to be cut as seasonable wood, then shew it to the Court, for it may very well be seasonable wood, and oaks which are called wrattons, which will not be timber but firewood, (*feuable bois*), it is not adjudged

waste in some places. A similar distinction is made by the Legislature in the statute for the preservation of woods, the 35 Hen. VIII. c. 17, s. 13. For Kent, Surrey, and Sussex, where wood is plentiful, are exempted from the provisions applicable to the rest of the kingdom. See also a precedent of a custom in a particular wood, to cut young oaks under the age of 20 years as seasonable wood, Rastall's *Entrées*, 698.

A man makes a feoffment in fee of a manor, to the use of himself and his wife, and his heirs; in which manor there are underwoods usually to be cut every 21 years. And afterwards the husband suffers the wood to grow 25 years, and afterwards he dieth. The question was, whether the wife, being tenant for life, might cut that underwood. And it was mooted, what shall be said seasonable underwood, that a termor or tenant for life might cut? DYER, Ch. J. and all the other Justices held, that a termor or tenant for life might cut all the underwood which had been usually cut within 20 years. In 11 Hen. VI. 1, issue was taken if they were of the age of twenty years or not? But in the wood countries they may fell seasonable wood, which is called *silva cædua*, at 26, 28, or 30 years, by the custom of the country. And so the usage makes the law in several countries. And so it is holden in the books of 11 Hen. VI. and 4 Ed. VI. But they agreed, that the cutting oaks of the age of eight or ten years is waste. Godb. 4. Pl. 6. Hil. 23 El. Another question mooted was, that at the time of the feoffment it was seasonable wood, and but of the growth of 14 or 15

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*use the word "under woods" *per se*, but "saleable underwoods:" and they have not in this or in any former statute affixed any definite meaning to the term *"underwood." If they had done so, we should feel ourselves bound to adopt that as the meaning

years; if this suffering of the husband of it to grow 25 years during the coverture, should bind the wife so as she cannot cut the woods? By DYER, Ch. J. and all the other justices: This permission of the husband shall bind the wife, notwithstanding the coverture, for that the time is *limited by law, which cannot be altered if it be not by the custom of the country. The wife cannot fell the wood, notwithstanding that at the time of her estate, she might, and afterwards by the permission of the husband during the coverture, the time is incurred so as she cannot fell it, because the law doth appoint a time, which if it be not felled before such time, that it shall not be felled by a termor or tenant for life, but it shall be waste. In *Foster v. Leonard*, 23 Elizabeth, Cro. El. 1, it is said, that the name *gras bois* is intended of such wood as serveth for building and other uses of a high nature, and not only for fuel as the nature of birch is. And of oak and elm cut down before the age of 20 years, tithes shall be paid, for until that age they are not of such value as the law requireth for the purposes aforesaid; and in *Hoe v. Taylor*, Cro. Eliz. 413, underwood was said by the Court to be a thing of inheritance and perpetuity; for after every cutting down they will grow again from the stubs. And S. C., 4 Co. Rep. 31. It is a thing of perpetuity to which custom may extend, for after every felling, the underwood grows again *ex stipitibus*, and, therefore, is grantable *eo nomine* by copy of court roll without the soil, and Moore, 355; S. C., Co. Litt. 58. Jenk. Cent. 274. This case occurred in 37 Elizabeth only 6 years before the passing of

the 43 of Elizabeth. In *Pincombe v. Thomas*, 16 Jac. I., Cro. Jac. 524, it was held that a grant of all saleable woods growing did not pass the soil. In the *Countess of Cumberland's* case, 8 Jac. Moore, 812, it was resolved by all the Judges, that birches, which in Yorkshire were proved to have been used, and serviceable for timber for sheep-houses, cottages, and such mean buildings, were in respect of the necessary use of them in that country timber, and belonged to the inheritance, and could not be taken by a tenant for life; and in *Brook v. Cobb*, 10 Jac., Brownlow and Goldesb. Rep. part 2, 150, waste for cutting down oaks, it appeared upon the evidence, that the said oaks were remaining upon the land for standills, according to the statute, at the last felling of that wood, and they were of the growth of 16 or 20 years, and that tithes were paid for it. And it was agreed by the Lord COKE, and the other Justices, that this was no waste, inasmuch as it was felled as acre wood. And it was said by the Lord COKE, that though it should be of the age of 20 or 24 years, yet if the use of the parties be to fell such for seasonable wood, this shall not be waste, and if tithes be paid for that, it appears that it is no timber.

It appears from these several authorities that tenant for life might cut down seasonable wood at seasonable time. That term seems to be synonymous with *sylva cædua*. It comprehends not merely coppice wood, or that species of wood which is cut periodically for firebote or heybote, or other inferior purposes; but by custom in particular countries where wood is plentiful, young trees

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of the word in construing the present Act. It has been said that all wood comes within the description either of timber or underwood, and therefore, that as firs and larches are not timber, they must be considered as underwood. It is not necessary to decide whether this be correct, because by the statute of Elizabeth, saleable underwoods only are subject to be rated to the relief of the poor. It may, however, be observed, that if all wood which is not timber, be underwood, it would follow, that horse-chestnuts, limes, plane-trees, and aspens would come within that description. Yet, surely, it would be a perversion of language to call such trees underwood. Generally speaking that term is applied *to a species of wood which grows expeditiously and sends up many shoots from one stool, the root remaining perfect from which the shoots are cut, and producing new shoots, and so yielding a succession of profits. It is probable that this is the description of coppice and underwood to which the statute of Elizabeth applies. But it is not necessary to decide that, inasmuch as that statute also requires that it should be saleable underwood, and the word "saleable" in *Rex v. Inhabitants of Mirfield*,† has been held to denote such as is intended or destined for sale, in contradistinction to such as is to supply the land with estovers for fuel and other purposes of the estate. It does not, therefore, come

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within the age of 20 years, which, if left to grow, would be timber. The cuttings of seasonable wood constitute part of the temporary renewable profits of the land, and therefore belong to tenant for life, and not to the inheritance. Underwood (*subbois*) is a species of seasonable wood, and, from the very term, seems to denote wood growing under other wood. That it originally bore that meaning appears from the pleadings in the case cited from the Year Book, 40 Ed. III. The plea was, that the hazels were growing in an inclosure, under great oaks, and were seasonable to cut. The replication, that waste was assigned in a part of the wood where there were *no gros bois*. And in Bro. Abr., Waste, 21, this case is cited to show that it is waste to cut

hazels in a part of a wood where there are no *gros* trees. The term underwood may not have that confined meaning at the present day. One quality, however, is essential to it as well as to every species of seasonable wood, viz. that "when cut, it grows again from the stubbs;" for waste is in that which, when cut, will not grow again: so it is waste to grub up underwood. It is quite clear, therefore, that the firs and larches, in the case before the Court, were not underwood, for when once cut, they would not grow again. [More learning on this subject is collected in *Dashwood v. Magniac*, '91, 3 Ch. 306, C. A., see especially the judgment of BOWEN, L. J.—F. P.]

† 10 East, 219.

within the description of saleable underwood, unless the prospect of deriving a profit by sale was the main object of the proprietor when the plantation was made. There are some species of wood, such as hazel, which are valuable only as underwood, and which must have been planted originally for the purpose of acquiring profit by sale. But of all plantations, fir is perhaps the least valuable, being chiefly, I believe, intended for protection rather than profit. It is found as a fact in this case, that these firs and larches were planted principally for the purpose of affording protection to the oak and ash. The latter were the most valuable. The firs, too, were cut only for the purpose of thinning the plantation. Some, indeed, were sold, but the greater part were used in the erection of buildings on the estate. Here, the trees when cut, were 30 feet high, which to be sure does not accord with one's notions of underwood. Nor could they have been planted with a view to a profit by sale, for if so, the cuttings would have taken place with *reference to their size; but here, the cuttings were made in fact merely for the purpose of thinning the plantations, and with reference to the main object, the encouragement of the growth of the more valuable trees. It is quite clear, therefore, that profit was not the sole or even principal object for which the firs and larches were originally planted; and if so, they are not saleable underwoods within the meaning of the 43 Elizabeth. It seems to me, that it would be most mischievous if property of this description was liable to be rated. It is an object of national policy to encourage the growth of timber. The grower of timber gives up a present profit with a view to future advantage, and it is fit that he should be encouraged to do so. If this be rateable property, then, according to *The King v. The Inhabitants of Mirfield*,† it must be rateable annually to the relief of the poor, though it should not happen to be cut more than once in 20 years. The grower, therefore, will be subject to an annual charge long before he can derive any profit. That would operate as a great discouragement to the growth of timber; and I cannot, therefore, think that the Legislature meant to subject property of this description to such an annual charge. The object of the statute was, to subject to the rate all such property

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† 10 East, 219.

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only as yielded a succession of profits. I am, therefore, of opinion, that whether this be underwood or not, at all events it is not saleable underwood, and therefore not rateable to the relief of the poor.

HOLROYD, J. :

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I am also of opinion that the firs and larches mentioned in this case are not saleable underwoods *within the meaning of those words, as used in the 43 Eliz. The word "underwood" must be there taken to be used in its popular sense, unless it be shewn to have been used differently by the Legislature in that or other statutes. After great research upon this subject, Mr. Milner has not been able to shew that it has been so used by the Legislature in any other sense. According to its popular meaning it signifies coppice, as distinguished from *hautbois*. I cannot agree that all wood which is not timber comes within the description of underwood. If that were so, beech, aspin, horse-chesnut, lime, and walnut trees, would be underwood in all places where they were not timber by the custom of the country. It certainly would be contrary to the popular meaning of that term, to call such trees underwood. Admitting, however, that these firs and larches were underwood, I am clearly of opinion, that they are not "saleable" underwoods within the meaning of the statute of Elizabeth. The general subject of rate in that statute is property yielding renewable profits; for even coal-mines when worked may be said, in some sense, to yield a succession of profits. Underwoods cut at stated periods do yield a succession of profits from time to time, though not annually. This is clearly not wood of that description, for when it is once cut, the root is destroyed, and there is no succession of profit. In order to ascertain whether these be saleable underwoods, the object for which they were planted and the mode of management ought to be taken into consideration. It is stated in the case, that the purpose of introducing the firs and larches into the plantations was to keep the oaks and ashes thick and sheltered, and to make a profit by cutting the firs and larches from time to time, when

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the *oaks and ashes, by reason of their growth, required more space. The principal object, therefore, of planting the firs, was to afford protection to the more valuable trees, and though a

profit from the cuttings was contemplated, yet the cuttings were to take place only when the other trees required more space. And although, in fact, some of the thinnings did yield a profit, the chief object, both of planting and cutting the firs and larches, was not to derive a profit from them *per se*, but to encourage the growth of the timber. The latter, when at maturity, was looked to as the principal source of profit. It appears that upon one occasion, even though eighteen acres were cut, no profit whatever was thereby produced; and that is a strong circumstance to shew, that the cuttings were not made with a view to sale, but to encourage and preserve the oaks and ashes. I am, therefore, clearly of opinion, that these firs and larches are not saleable underwoods within the meaning of the statute of Elizabeth.

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BEST, J. :

It certainly would be very desirable, that every species of property should be rateable to the relief of the poor. The statute of Elizabeth, however, directs the rate to be raised by taxation of every occupier of lands, houses, tithes impropriate, appropriations of tithes, coal-mines, or saleable underwoods. The first four species of property mentioned in the statute yield an annual profit, and coal-mines, when worked, usually produce something like an annual profit. In the reign of Elizabeth, underwood was probably more generally used for fuel than at present; it yielded also a profit at certain intervals, though not annually. The Legislature, too, have not merely used the term underwood, but have qualified it by the word "saleable," thereby meaning *that species of underwood which is generally produced for the purposes of sale, which is cut down at stated periods, produces new shoots, and thereby yields at certain intervals profits coming as nearly as possible to annual profits. It appears, in this case, that the cuttings did actually yield some profit, but they are not necessarily rateable on that account. The property ought to be of that description from which the owner is likely to derive a certain profit. Now, when this plantation was made, the owner could not reasonably expect to derive any profit from the mere cuttings of the firs and larches. The great object which he had in view was profit from the more valuable trees,

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of which the firs and larches were to be the shelter and protection. The latter were not to be considered objects of profit till that purpose was attained. It has been argued that, as these firs would be titheable, they are, therefore, subject to be rated to the poor; but that by no means follows; for by the stat. 45 Edw. III. c. 3, *gros bois* of the age of 20 years, in respect of which the clergy had claimed tithe, under the name of *sylva cædua*, is expressly exempted from tithe. Now, *gros bois* means timber, and by the common law, includes oak, ash, and elm, and by the custom of the country, in particular places, many other species of trees. Every species of wood which is not timber by the common law or by custom, is titheable. By the statute of Elizabeth no species of wood but saleable underwood is liable to be rated to the relief of the poor. It has been said that *sylva cædua* and underwood are synonymous. In *Ford v. Racster*,† however, Lord ELLENBOROUGH, delivering the judgment of the Court, says, “*Sylva cædua* and *subbois*, *or underwood, are not, it should seem, from stat. 45 Edw. III., synonymous; for *subbois* is stated to be comprehended in it, not to be it itself, or to be the same thing with it. *Sylva cædua* seems to comprehend *vi termini* besides underwood, all such wood as is occasionally cut, either in body, branch, or root, with the statutable exception only of *gros bois* properly so called, when it is of that age at which it is by the stat. 45 Edw. III., exempt from being tithed, *i.e.* of twenty years or upwards.” Underwood, therefore, is one species of *sylva cædua*; and, possibly, the firs and larches may be *sylva cædua*, though not underwood. It is, however, unnecessary to decide in this case, whether these firs be underwood or not. It is sufficient to say, that they are not saleable underwoods, and, therefore, that they are not rateable to the relief of the poor.

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Order of Sessions confirmed.

† 16 R. B. at p. 413 (4 M. & S. 137).

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(1 Barn. & Cress. 389—397; S. C. 2 Dowl. & Ry. 651.)

Where a corporation, consisting of a mayor, aldermen, and twenty-four capital burgesses, was seised in fee of certain pasture lands, and appointed a ranger to keep the keys of the gates, clean the ditches, preserve the fences, and impound cattle trespassing thereon; and, at a Court held annually, made such regulations concerning their pastures, and the number of cattle each burgess was to turn on, and the sum to be paid in respect thereof, which money, after deducting the expenses of management of the land, was distributed among the burgesses who did not turn on: Held, that the corporation were liable to be rated to the poor, as the beneficial occupiers of these pastures.

UPON an appeal by the mayor, aldermen, and capital burgesses of the borough of Sudbury, against the poor-rate of Ballingdon in Essex, on the ground that they were rated for property which they did not occupy, the Sessions confirmed the rate, subject to the opinion of this Court, on the following case:

Richard De Clare, about the year 1250, granted certain pasture land, called Portman's Croft, in the hamlet of Ballingdon, to

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his burgesses and whole commonalty of Sudbury;" and Charles II., by his charter, under which the corporation now exists, confirmed the said grant to the mayor, aldermen, and burgesses. This land is inclosed, and the corporation, consisting of a mayor, six aldermen, and 24 capital burgesses, appoint and have always within the time of living memory, appointed, a person who is called the ranger of the commons, to keep the keys of the gates, clean the ditches, preserve the fences, impound cattle trespassing, and do other acts of a similar description. They have, during all that time, at a Court called a Court of Orders and Decrees, annually made such regulations concerning their commons, as they thought proper, and given a public notice of them by the common crier; and for the year when the

† Followed in *R. v. Mayor, &c. of York* (1837) 6 A. & E. 419. The case is notable as an early and sound decision on the principle of rating a corporation; as to which, until the decision of the House of Lords in

the *Mersey Docks* cases (1864) 11 H. L. C. 444, there existed misapprehensions, to which the Act 4 & 5 Vict. c. 48, lent an apparent sanction.—R. C.

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rate in question was imposed, the order declared, that every burgess who had a right to turn on his cattle to feed on the commons, should put two head of cattle, and no more, on Portman's Croft. It then proceeded to appoint the day when the cattle should be turned on, and to fix the price for each head of cattle, which price is always paid by the freemen exercising this right (who amount to more than 100) to the treasurer of the corporation. The mayor, aldermen, and capital burgesses (being resident) enjoy the same right upon the same terms, and some of them exercised it during the year for which the rate was made. The cattle are branded by the ranger when turned on. The whole of the money thus paid to the treasurer, after deducting the expenses incident to the management of the land, is distributed among the poorer burgesses, *who have, but do not, on account of their poverty, exercise a right of depasturing cattle. The mayor, aldermen and capital burgesses, were rated in their corporate capacity, as the occupiers of Portman's Croft; and the questions for the opinion of this Court were, whether there was any rateable occupation of Portman's Croft; and if there were, whether the corporation, or the individuals who depastured their cattle upon it, were liable to be rated?

Walford (with whom was *Brodrick*) in support of the order of Sessions, after citing *Rex v. The Trustees for the Burgesses of Tewkesbury*,† was stopped by the COURT.

Knox, contra :

The lands in respect of which the rate was imposed, are the soil and freehold of the corporation, and the whole of the corporation have the beneficial occupation of them. *Rex v. Watson*‡ is a direct authority upon this subject. The only distinction between the two cases is, that here the corporation appoints a ranger, who performs a variety of services, all of them of an onerous nature, only as respects the corporation, such as cleaning the ditches, &c. but beneficial to the individuals in the occupation of the land. The ranger, though appointed and

† 13 East, 155.

‡ 5 East, 480; 2 Smith, 144.

paid by the corporation, is the servant of the individuals who stock, and perhaps in strictness, he may be said to be paid by them, as the price of depasturing the cattle is regulated by the expenses of the corporation, of which his charges and salary must form a part. The case of **Rex v. The Trustees of Tewkesbury* is perfectly consistent with the decision in *Rex v. Watson*. Lord ELLENBOROUGH, in delivering his judgment in the former case, states, that “the trustees of Tewkesbury were not bound, as in *Rex v. Watson*, not to take in the cattle of strangers, but might contract with any persons, by the year, month, or week.” They were merely agisters of cattle; a very common mode of occupying land. Here, the owners of the cattle, as a matter of right, used the land, subject, indeed, to the stint that is imposed at the annual court. They are tenants in common with the corporation in respect of the fee. It cannot be argued, that an occupation by some tenants in common must be taken as the occupation of all. Those who do not actually occupy, stand in the relation of landlords to the others. To rate them, therefore, would be to rate parties not liable under the statute. Officers in corporations are frequently allowed to have the occupation of part of the corporation property. They, and not the corporation, it has been decided, must be rated for it, because the rate must be laid upon the actual beneficial occupier. In these instances it might be urged, if an occupation could be in any case implied, that, as the occupation is allowed to these officers for the general benefit of the corporation, it must be considered a virtual occupation of the corporation in their hands. But the present case is still stronger. Here is a sum actually paid by those who occupy; it is not a permissive occupation only; the sum is, to all intents and purposes, a rent for a year’s beneficial occupation. It is not to be likened to the sale of an aftermath. There is no other beneficial occupation by any other parties during the year; the land is pasture, and only used for **the purposes of grazing*. It may be more convenient to rate the corporation in one sum than so many individuals, but the rate cannot be supported on the grounds of convenience only, and it is to be observed, that there were nearly as many individuals in the *Huntingdon* case to be rated as in the present. There is no difficulty in ascertaining

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 THE MAYOR what is to distinguish them from other tenants in common? It
 OF SUDBURY. is said, the corporation alone could maintain trespass. It seems
 to have been the opinion of LAWRENCE, J. in *Rex v. Watson*,
 that the corporation of Huntingdon could not maintain trespass
 after the land had been so stinted out among certain of the
 burgesses.

BAYLEY, J. :

I am of opinion that the corporation were the beneficial occupiers of the land in question, and, consequently, that the order of Sessions must be confirmed. We have been pressed strongly in the course of the argument, with the case of *Rex v. Watson*, † but that case differs from the present in two important particulars. There the individuals who turned on had the exclusive enjoyment of the land, for the purpose of turning on their cattle. No payment was made by them to the corporation, but to those resident burgesses who had the right to stock and did not exercise it. Here it is clear, from the facts stated in the case, that the corporation retained the exclusive right to the possession of the land. They appointed a ranger, he was their servant, and paid out of their funds; his duty was to keep the keys of the gates, clean the ditches, *repair the fences, and impound cattle: all these acts are usually done by the occupiers of land. The commoners could not insist upon having the keys from him. If the occupation, however, was in them, they would be entitled to have the control of the gates, and they would be bound to do the several acts in respect of their occupation, which the corporation did by their servant. The corporation received the agistment-money paid in respect of the cattle turned on the land; they therefore occupied the land as agisters of cattle. The present case appears to me to fall within the principle of the decision in *Rex v. The Trustees for the Burgesses of Tewkesbury*. ‡ The only difference is, that there the common was fed by the cattle of strangers, and here, by the cattle of the members of the corporation. If, however, the exclusive occupation of the land is in the corporation, the principle upon which

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† 5 East, 480; 2 Smith, 144.

‡ 13 East, 155.

that case was decided is applicable to the present. There, an Act of Parliament had vested the aftermath of a certain meadow in trustees, in trust for the burgesses and principal householders of Tewkesbury, with power to let the same annually for the best rent, and also to let it in pastures for cattle, &c. to different persons, at such rates and subject to such regulations, as the trustees should appoint, or by writing under their hands and seals, to demise the same for a term of years; the rents and profits, after payment of all charges, to be divided by the trustees amongst the objects of the trust. The trustees having let out the aftermath in pastures, at so much per head, for horses, cattle, and sheep, were held to be the occupiers of the land, and, consequently, *rateable for the same. The trustees were there considered as taking in cattle to agist, and particular stress was laid by the Court upon the circumstance, that there was no letting of any definite portion of the aftermath. Now, in this case, no definite portion of the land is let to any one individual. The corporation do nothing more than take in cattle to agist; they do not even know, in the first instance, how many cattle will come in. For these reasons, it seems to me that this case falls within the principle of the decision in *Rex v. The Trustees for the Burgesses of Tewkesbury*, and is distinguishable from *Rex v. Watson*. If it were necessary to overrule either case, I should adhere to the decision pronounced in the former case, which seems to me to furnish a more reasonable rule of construction than *Rex v. Watson*.

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HOLROYD, J.:

This case differs from *Rex v. Watson* in several particulars. In that case it did not appear that the corporation did any acts upon the land. The temporary ownership seems to have been given up to the three persons mentioned in the case. Here the right of soil is in the corporation; they have the management of the land by the ranger, their servant, who keeps the keys of the gates, and cleans the ditches; at the Court mentioned in the case, they annually make regulations with respect to the mode of enjoyment of the commons by the burgesses. The money paid in respect of the cattle turned on, is received by the

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corporation, though it be afterwards distributed among the poorer burgesses. Many of these acts done by them could only be done in respect of their being in possession of the land. That is perfectly consistent with the exercise of subordinate *rights by the burgesses. In respect of any injury done to the land itself, trespass would lie by the corporation, but in respect of any injury done to the right of common, the burgesses could only maintain an action on the case. In *Rex v. Watson*, the part of the common situated in the parish of St. Mary seems to have been in the exclusive occupation of the three persons mentioned in the case. The objection to the rate was, that those persons were not rated for certain lands in the parish of St. Mary, over which they had commonable rights, which said land, in the notice of appeal, was stated to be in the respective occupation of the said three persons. The case stated that the mayor, aldermen, &c. of Huntingdon were the owners and proprietors of large tracts of land within the borough, used as a common of pasture, and stocked by the burgesses, part of which lands, viz. those mentioned in the notice of appeal, was in the parish of St. Mary. Now, that part in the parish of St. Mary was stated in the notice of appeal to be in the occupation of three persons named in the case. Those persons appear, therefore, to have had the exclusive occupation of those lands at the time when the rate was made. During that time the corporation could not do any act upon the land; they could not maintain trespass for any injury done to the land. Here the possession is in the corporation, although there be a subordinate right in others. There was no letting of any definite part of the common to the burgesses, there was no rent reserved, but merely something paid for the agisting of the cattle. For these reasons I am of opinion, that this case differs from that of *Rex v. Watson*, and that the order of Sessions must be affirmed.

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BEST, J. :

I think *Rex v. The Trustees for the Burgesses of Tewkesbury* furnishes a more just principle of construction than *Rex v. Watson*, and I should be disposed to overrule the latter case, if it were necessary to do so in the present instance. If A. occupies

for the benefit of B. C. and D., A. is to be rated. Here, the corporation are the owners as well as the actual occupiers of the common, although they occupy for the benefit of individual corporators, viz. first, for the benefit of the burgesses who put in their cattle; and, secondly, for the benefit of the poorer sort, among whom the money received is afterwards to be distributed. The burgesses are nothing like tenants in common; they have no interest whatever in the soil; it is clear that the corporation retained possession by their officer; he could not otherwise impound cattle damage feasant, that being an injury done to the occupier of the land. The corporation are even to decide how many cattle each burgess is to turn on. This shews clearly, the right of occupation to be in the corporation, although the right of turning on be in different members. It seems to me that this is not distinguishable from the case of persons taking in cattle to agist. The corporation must be considered as the owners, for it is impossible to rate any other person; for before the orders of the Court are issued, the individuals who are likely to have any interest are unknown.

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1823.

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LAING v. BARCLAY.

(1 Barn. & Cress. 398—407; S. C. 2 Dowl. & Ry. 530; 1 L. J. K. B. 135;
at Nisi Prius, 3 Starkie, 38.)

A. and B., merchants in London, being applied to on behalf of C., resident at Demerara, to give him a letter of credit for 30,000*l.* to enable him to purchase produce to load certain vessels for the port of London, and to accept his drafts at ninety days' sight on receiving invoice, bill of lading, and orders for insurance to the extent of certain fixed prices for various kinds of produce, wrote to C., stating that they consented to make the advances required upon the terms described; and that upon receiving the documents before mentioned, and no irregularity appearing, they would accept his drafts at the "usual date" to the extent of 30,000*l.* C. shipped produce to the value of 800*l.* on board one vessel, and to the value of 1,800*l.* on board another, and sent the necessary documents to A. and B., and directed the surplus of the proceeds of the first cargo (after repaying the advances of A. and B.) should be paid to D. in London, and that the surplus of the second should be held by them to abide by his future advice. C. afterwards drew a bill upon A. and B. for 500*l.* at six months' sight, and did not specify to the account of which cargo it was to be charged. A. and B. refused to accept it, and C. having thereupon brought an action against them: Held, first, that C. was not bound to draw at ninety days, but might draw at any "usual date," and that six months could not be considered unusual, the jury not having found it to be so. Secondly, that C. was not bound to specify to which cargo the bill was to be charged; for that, in the absence of any direction by him, A. and B. might charge it to either at their election.

ASSUMPSIT to recover from the defendant, as surviving partner of Gurney Barclay, deceased, the sum of 100*l.*, paid by the plaintiff upon a certain bill of exchange for 500*l.*, drawn by the plaintiff upon the defendant and his late partner, and the damages which have accrued to the plaintiff, by reason of the refusal of the said defendant and Gurney Barclay, deceased, to accept and pay the full amount of the said bill of exchange, when the same became due and payable; and also the further sum of 421*l.* 1*s.* 11*d.*, the net proceeds of 55 puncheons of rum, sold by the defendant and G. B., deceased, on the plaintiff's account, together with lawful interest, from the 11th day of October, 1820. The declaration contained several special counts, on promises to accept the said bill of exchange, and also counts for goods sold and delivered, and the money counts. The defendant pleaded the general issue, and paid into court the sum of 21*l.* 1*s.* 11*d.*, upon the count for money had and received,

and also gave notice of set-off. At the trial before Abbott, Ch. J. at the London sittings after Trinity Term, 1821, a verdict was found *for the plaintiff, damages 525*l.*, subject to the opinion of the Court, upon the following case :

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The plaintiff is a merchant in the colony of Demerara, and the defendant is the surviving partner of Gurney Barclay, deceased, and the said defendant, and the said Gurney Barclay, until his decease, traded as merchants, in co-partnership, under the firm of Barclay Brothers. In the month of September, 1818, George Laing, who was a correspondent of the plaintiff, and carrying on trade in London on his own account, applied to Barclay Brothers, and requested them to give the plaintiff a letter of credit, to the extent of 30,000*l.*, to which they assented, and wrote the following letter to the plaintiff on that occasion, bearing date London, September 3rd, 1818 : “ Mr. George Laing, of this city, has done us the favour to give us your address, and has made to us the following proposition in your behalf, viz. that we should give you a letter of credit, to the extent of 30,000*l.*, in order to enable you to purchase produce, to load for this port the *William Penn*, the *Henry*, and the *Susan*, now on their voyage to your colony. That we should accept your drafts on us at 90 days sight, on receiving invoice and bill of lading, with orders for insurance, to the extent of 90*l.* per ton for coffee, 28*l.* per ton for sugar, 1*s.* 6*d.* per gallon for rum, and 1*s.* 6*d.* per pound for cotton ; and he directs, that the balance of the proceeds of the cargoes, after deducting our advances, charges, and commission, should be paid to him (George Laing). In reply to this proposition, we hereby consent to make the advances required upon the terms described, that is to say, at the rate of 90*l.* per ton British, for coffee (&c. as before), on receiving the bill of lading, filled up to our order, with the particular freight specified, and accompanied by an *order for insurance. On receiving these documents, and no irregularity appearing, we shall accept your drafts at the usual date, to the extent of 30,000*l.*” The *Susan*, *Henry*, and *William Penn*, arrived at Demerara, and the plaintiff, after having received the said letter of September 3rd, 1818, purchased and shipped on board the *Susan* a quantity of rum and coffee. On the 15th of January,

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1819, the plaintiff wrote to Barclay Brothers, directing an insurance to be effected on colonial produce, to be shipped in the *Susan*, to the value of 800*l.*; and on the 23rd of the same month, forwarded to them an invoice and the bill of lading filled up to their order, and specifying the particular freight. On the 11th of February, 1819, the plaintiff wrote again to Barclay Brothers, and directed an insurance to be effected, to the value of 1,800*l.* on produce, by the ship *Henry*. On the 26th of the same month the plaintiff purchased and shipped on board the *Henry* a quantity of coffee, sugar, rum, and lancewood spars, and on the same day wrote and sent another letter to Barclay Brothers, forwarding an invoice thereof, together with a bill of lading, filled up to their order, bearing date the 26th day of February, 1819, and specifying the particular freight to be paid, and directing them to hold the proceeds, and abide by his future advice. On the 4th March, the plaintiff drew upon Barclay Brothers a bill of exchange, of which the following is a copy: "DEMERARA, 4th March, 1819. Six months after sight of this second of exchange (first, third, and fourth unpaid) pay to G. Ross, or order, 500*l.* sterling value received, and charge the same to account, as advised;" and on the 10th of the same month advised them thereof by letter. On the 4th of May, 1819, the before-mentioned bill of exchange was presented to

[*401] *Barclay Brothers for acceptance, they refused to accept it, and of such refusal informed the plaintiff by letter, dated 11th May, 1819, of which the following is an extract: "We have now to acknowledge the receipt of your favour of the 10th of March, advising your draft upon us to G. Ross, Esquire, for 500*l.*, which has appeared for acceptance, but as you have not explained to us on what account it was drawn, and as the adverse situation of your brother's affairs imposes the necessity of great caution in our proceedings, we have very reluctantly yielded to the propriety of giving it a refusal." The plaintiff, on receiving this letter, made provision for the bill, by shipping on board the *Alliance* 55 puncheons of rum, and indorsed and forwarded to Barclay Brothers the bill of lading thereof, together with an invoice, with directions to sell the same on the plaintiff's account, in order that, with the proceeds thereof, they might protect the

said bill of exchange when due. On the 6th of November, 1819, that bill having become due and payable, was presented to Barclay Brothers, for payment, and upon that occasion they paid 400*l.* on account, but refused to pay the remainder. It was in consequence protested for non-payment, and ultimately the plaintiff was, in virtue of security which he had given in the colony of Demerara, obliged to pay the remainder with damages and charges thereupon. The net proceeds of the 55 puncheons of rum shipped on board the *Alliance* was 421*l.* 1*s.* 11*d.*: and the 400*l.* paid by Barclay Brothers, on account of the bill of exchange, was part of those proceeds. The case was now argued by

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Brougham, for the plaintiff:

Unless it can be shewn that the plaintiff neglected the terms imposed upon him *by the letter of credit written by Barclay Brothers, he is clearly entitled to recover in this action. It appears by the case, that the bills of lading, invoices, and orders for insurance were regularly sent, and the only semblance of irregularity consists in the bill having been drawn at six months sight instead of 90 days. Upon examining the letter of credit, however, it will be found that this is no irregularity, for the 90 days are mentioned in that part of it only which speaks of the proposal made by G. Laing; in the undertaking of the defendant and his former partner, the expression "usual date" is introduced. The plaintiff, therefore, was not bound by the letter to draw at 90 days, and Barclay Brothers could not sustain any injury by the extension of the time to six months. But even supposing that they had a right to refuse acceptance, they should have given notice of the ground of that refusal, and then the plaintiff might have drawn a fresh bill. Now, in their letter of the 11th of May, 1819, the ground assigned for the rejection of the bill, is the embarrassment of G. Laing's affairs; no hint was given of any irregularity on the part of the plaintiffs.

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Campbell, contra:

The plaintiff was irregular in two particulars; first, in not stating on what account the bill was drawn; and, secondly, in

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drawing at six months instead of 90 days. Three ships, mentioned in the letter of credit, were to be sent out, the *Susan*, *Henry*, and *William Penn*. The *Susan* was first laden, and the bill of lading sent to Messrs. Barclay on the 28rd of January. According to the letter of credit, the goods were to be bought by the plaintiff in Demerara, and consigned to Messrs. Barclay in London, to reimburse themselves and *pay over the surplus to G. Laing, for whose benefit the speculation was entered into.

(BAYLEY, J.: There is nothing to shew that it was for his benefit.)

The first cargo was consigned to be disposed of according to the original agreement. But afterwards goods were sent by the *Henry*; and the plaintiff, by letter of the 26th of February, 1819, directed that the surplus of that cargo should go in a different course, viz. according to his future advice. On the 4th of March, 1819, the bill in question was drawn. Messrs. Barclay then had two cargoes in their hands to be disposed of in different ways; and the plaintiff not having stated upon account of which he drew, Messrs. Barclay knew not against which they were to charge the bill. That this is an important irregularity, appears from the difficulty which has arisen from it. G. Laing has become bankrupt, and his assignees claim the proceeds of the cargo by the *Susan* without allowing the amount of this bill. Drawing in this manner was therefore a plain departure from the original contract, and absolved Messrs. Barclay from their obligation to accept. But, secondly, there was irregularity in drawing at six months sight instead of 90 days. The expression "usual date" in the latter part of the letter of the 3rd of September, 1818, refers to the 90 days in the former part of it; but, even if that be not so, in order to help the plaintiff, the jury should have found that six months is the usual date, and nothing of that sort appears upon the case. If, indeed, the variance could not possibly be injurious, the defendant might not be able to avail himself of this objection; but he may be prejudiced by it in several ways. Acceptances at distant days are discreditable, and may on that account be injurious to a commercial

house. But another *injury may also arise from it, the letter written by Messrs. Barclay was in the nature of a guarantee for G. Laing, and was therefore a giving of credit to him for 90 days. Now, if the goods proved insufficient to cover the advances, as soon as the bill was paid, Messrs. Barclay might have sued G. Laing, and therefore, by drawing at six months, the plaintiff imposed upon them the necessity of giving to G. Laing credit for that period instead of 90 days; and if it be considered that G. Laing was not the principal in this transaction, still the same argument applies, for then an extended credit would be given to the plaintiff instead of his brother. In either of these ways the defendant may be injured by the irregularity of the plaintiff, and was therefore justified in refusing to accept the bill in question, and the plaintiff shewed his acquiescence in that refusal by sending other goods to provide for the bill.

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Brougham, in reply, was stopped by the Court

BAYLEY, J. :

It seems to me quite clear that our judgment should be for the plaintiff. This was an action against the defendant for not accepting a bill of exchange in pursuance of his contract so to do. That engagement was contained in the letter written by the defendant and his late partner, on the 3rd of September, 1818, wherein they state that a proposition had been made to them by G. Laing on behalf of the plaintiff, and that they consent to make the advances required upon certain terms; and that no irregularity appearing, they will accept the plaintiff's draughts at the usual date to the extent of 30,000*l*. On the 15th of January, 1819, the plaintiff transmitted to Messrs. Barclay an order *to insure goods by the *Susan*, value 800*l*., and on the 30th of the same month he sent the bill of lading and invoice; on the 11th of February, he sent an order to insure goods by the *Henry*, value 1,800*l*., and on the 26th of that month the bill of lading and invoice of those goods. The plaintiff, therefore, complied with the conditions imposed by the letter of the 3rd of September, 1818, as to bills of lading, invoices, and orders to insure upon goods to the value of 2,600*l*. That being so, on the

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4th of March, 1819, he draws the bill in question for 500*l.*, and the question is, whether it be such as the defendant was bound to accept. It was drawn at six months and not 90 days' sight, and was directed to be charged to account as advised, without specifying to the account of which cargo it was to be charged. This bill being presented for acceptance, Messrs. Barclay reject it, and in a letter of the 11th of May, 1819, assign the following reasons, "as you have not explained to us on what account it was drawn, and as the adverse situation of your brother's affairs imposes the necessity of great caution in our proceedings, we have very reluctantly yielded to the propriety of giving it a refusal." No objection was then made to the six months' sight; and the situation of G. Laing's affairs has not been urged to-day; the only ground, therefore, stated in that letter for rejecting the bill, and still relied upon by the defendant, is that the account whereupon it was drawn, was not specified. Now, the defendant and his late partner had at that time the bills of lading of the goods shipped on board both the *Susan* and the *Henry*, and might therefore charge the bill in question to the account of either of those cargoes at their election, or they might have written to the plaintiff for further *directions. The usage of trade might perhaps make it necessary for the drawees to write and enquire, but the law certainly does not, under such circumstances, absolve them altogether from the obligation to accept. But it is urged in the second place, that the extension of the time that the bill was to run, was an irregularity, and that the defendant may now insist upon that as a defence, although it was not mentioned in the first instance. If, indeed, the original letter had said, that the bills should be drawn at 90 days and *no other* date, there might have been some weight in that argument, but unless it can be rendered quite clear that such was the understanding of the parties, the objection will not prevail. Now it appears, that 90 days was the time proposed by G. Laing on behalf of the plaintiff, and the defendant answers, that he will accept at the usual date. If six months had been unusual, the jury might have found it to be so. But as they have not so found it, and as the defendant himself did not at first make this objection, we are well warranted in saying that it is

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not an unusual date. One observation made by *Mr. Campbell* at first produced a considerable impression, viz. that the extended date might delay a suit against the plaintiff, and that, in the mean time, he might become insolvent, and in that point of view it might be injurious to the acceptors. But taking all the circumstances into consideration, it is quite manifest that Messrs. Barclay meant to accept the plaintiff's bills on the security of money or produce in hand, to answer the amount of them, and not upon the personal security of either the plaintiff or his brother G. Laing. So that it could not be injurious to the defendant to accept bills at six months instead of 90 days. Both the objections relied upon *are therefore unavailing, and the plaintiff is entitled to retain the verdict which has been found in his favour.

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HOLROYD and BEST, JJ. concurred.

Postea to the plaintiff.

VYVYAN v. ARTHUR, ADMINISTRATRIX OF N. D.
ARTHUR, DECEASED.

1823.

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(1 Barn. & Cress. 410—417; S. C. 2 Dowl. & Ry. 670; 1 L. J.
K. B. 138.)

A. being seised in fee of a mill and of certain lands, granted a lease of the latter for years, the lessee yielding and paying to the lessor, his heirs and assigns, certain rents, and doing certain suits and services; and also doing suit to the mill of the lessor, his heirs and assigns, by grinding all such corn there as should grow upon the demised premises. The lessor afterwards devised the mill and the reversion of the demised premises to the same person: Held, that the reservation of the suit to the mill was in the nature of a rent, and that the implied covenant to render it resulting from the reddendum, was a covenant that ran with the land as long as the ownership of the mill and the demised premises belonged to the same person, and consequently that the assignee of the lessor might take advantage of it.

COVENANT by the devisee of the lessor against the administratrix of the lessee. The declaration stated, that at the time of making the lease Thomas Vyvyan the lessor was seised in fee of the demised tenements with the appurtenances, and also

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of a certain mill ; and being so seised, on the 24th June, 1779, by indenture demised to N. D. Arthur, his executors, administrators, and assigns, a close of land together with certain common of pasture in the indenture described. Habendum for 99 years, if three persons therein mentioned should so long live, yielding and paying to the lessor, his heirs and assigns, certain rents, sums of money, payments, and returns ; and also doing certain suits and services in the indenture mentioned ; and also doing suit to the mill of the said Thomas, his heirs and assigns, called Tregamere mill, by grinding all such corn there as should grow in or upon the close thereby demised during the term. The declaration then stated the entry of the lessee, and that the lessor being seised in fee of the reversion of the demised premises, by his will devised the same, and also the said mill unto three persons in the will mentioned, their heirs and assigns, to the use of the plaintiff for his life ; that the lessor died ; and that by force of the statute made for transferring *uses into possession, the plaintiff became seised of the reversion in the demised premises and of the mill for the term of his life ; that the lessee died intestate during the continuance of the term ; and that administration was duly granted to the defendant ; and that one of the persons for whose life the lease was granted was still living. Breach, that after the plaintiff became seised of the reversion of the demised premises and of the mill, and during the lifetime of the lessee, corn grew upon the demised premises which ought to have been ground at the mill ; yet the lessee in his lifetime, and the defendant since his death, did not do suit to the mill of the plaintiff, by grinding there the corn so grown upon the demised premises, but wholly neglected so to do. To this declaration there was a general demurrer.

F. Pollock, in support of the demurrer :

This is not a covenant which runs with the land, for it does not affect the nature, quality, or value of the thing demised. In *Spencer's case*† it is laid down, that if the lessee covenant

† 5 Co. Rep. 16.

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for him and his assigns, to build a house upon the land of the lessor which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee because it is merely collateral, and in no manner touches or concerns the thing that was demised or assigned over ; and therefore, the assignee cannot be charged with it no more than any other stranger. Now, here the act required to be done, is to be done upon land of the lessor, which is no parcel of the demise. In *Bally v. Wells*,† the lessee of tithes covenanted not to let any of the *farmers of the parish have any part of the tithes ; and this was held to be a covenant running with the land, expressly on the ground, that the thing to be done concerned the thing demised, and tended to support and preserve the estate of tithes in kind. In *Vernon v. Smith*,‡ a covenant to insure against fire premises situated within the weekly bills of mortality, was held to be a covenant which runs with the land, because, by the 14 Geo. III. c. 78, s. 83, the landlord was entitled to have the sum insured laid out in rebuilding the premises, and therefore, that it was equivalent to a covenant to lay out the money in rebuilding the premises. In *The Mayor of Congleton v. Pattison*,§ the lessee covenanted not to hire persons to work in the mill who were settled in other parishes without a certificate ; and it was held not to be a covenant running with the land, although by possibility it might affect the value of the land by creating a greater number of the poor. In *Purfrey's case*|| the covenant was, that the lessee of a tavern should account monthly to the lessor for the wine which he sold, and should pay unto him so much money for every ton sold ; and it was the better opinion of the Court, that it was not a covenant running with the land or reversion, but was a collateral thing, and did not pass to the assignee of the lessor. This doing suit to the mill is not in the nature of rent, for rent is incident to the reversion. Now here, if the original lessor had parted with his property in the mill, the doing suit at the mill would be a service due to the owner of the mill, and not to the owner of the reversion of the demised premises.

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† 3 Wils. 25 ; Wilm. Notes, 344, S. C.

§ 10 East, 130.

|| Moore, 243 ; Godb. 120.

‡ 24 B. R. 257 (5 B. & Ald. 1).

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Gaselee, contra :

The doing suit at the mill is in the nature of rent, and may have been reserved in lieu of an additional rent. It is more connected with the land than a money rent; for the produce of the land itself is to be taken to the lessor's mill, and he is to derive a profit out of it. The case from the Year Book of the 42 Ed. III. 8 is expressly in point. That case is thus stated in *Spencer's case*.† "Grandfather, father, and two sons; the grandfather was seised of the manor of D., whereof a chapel was parcel: a prior, with the assent of his convent, by deed covenanted for him and his successors with the grandfather and his heirs, that he and his convent would sing all the week in his chapel, parcel of the said manor, for the lords of the said manor and his servants, &c. The grandfather did enfeof one of the manor in fee, who gave it the younger son and his wife in tail; and it was adjudged that the tenants in tail, as terre tenants, (for the elder brother was heir,) should have an action of covenant against the prior; for the covenant is to do a thing which is annexed to the chapel, which is within the manor, and so annexed to the manor as it is there said But if such covenant were made to say divine service in the chapel of another, there the assignee shall not have an action of covenant; for the covenant in such case cannot be annexed to the chapel, because the chapel doth not belong to the covenantee, as it is adjudged in 2 Hen. IV. 6 b. But there it is agreed that, if the covenant had been with the lord of the manor of D. and his heirs, lords of the manor of D. and inhabitants therein, the covenant shall be annexed to the manor, and there the terre *tenant shall have the action of covenant without privity of blood."

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He was then stopped by the Court.

BAYLEY, J. :

I am of opinion that this is a covenant which runs with the land, so as to entitle the assignee of the reversion to maintain this action, which is brought against the defendant, not as assignee, but as personal representative of the lessee. An action

† 5 Co. Rep. 18.

at the suit of the assignee of the reversion is maintainable in some cases at common law ; in others, under the statute of the 32 Hen. VIII. I rather think that this case belongs to the former class. The lease contains a reddendum, and whatever services or suits are thereby reserved partake of the character of rent. Now, one of the services to be rendered to the lessor in this case is, that the lessee shall grind all the corn grown upon the demised premises at the lessor's mill. It is true that rent goes with the reversion of the land in respect of which it is reserved. But in this case, at the time of granting the lease, the lessor was seised in fee of the mill, as well as of the reversion of the premises devised ; and, therefore, so long as the property in the mill and the reversion of the demised premises continued to be in the same person, the suit to the mill would continue to be a suit due to the owner of the reversion of the demised premises, and would, therefore, in that respect, be in the nature of a rent. It is by no means unusual for the owner of a mansion and estate to stipulate with his tenants that they should carry coals to his mansion, and perform other similar services, and as long as the ownership of the mansion and the estate continues in the same person, those services are in the nature of rent, to be rendered to the reversioner of the lands demised. Now *here, the plaintiff is the reversioner of the thing demised, and also owner of the mill. In the case cited from the 42 Ed. III. the prior and his successors took no interest in the land, yet the covenant to sing in the chapel was held to run with the land. Here the covenantor is tenant of land to the covenantee, and the suit to be done to the mill is in respect of the land demised. It is not necessary for us to decide what the case would be if the ownership of the land demised and the mill had been severed. Here the lessor continued owner of the reversion of the demised premises and of the mill from the time of granting the lease till the time of his death, and the plaintiff, as his devisee, then became entitled to both, and now continues so. My judgment is founded entirely on the unity of title to the reversion of the land demised and to the mill.

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HOLROYD, J. :

The case cited from the Year Book of the 42 Edw. III. seems

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to me to govern the present, and is much stronger. I think this is a covenant running with the land at common law. Here the close was leased to the lessee, his executors, administrators, and assigns, yielding the rents, and doing the suits and services therein mentioned. The suits and services are to be rendered by the lessee, his executors, administrators, and assigns, to whom the lands are leased; and this suit is to be rendered to the mill of the lessor, his heirs and assigns; so that it appears to have been the intention that the assignees of the lessor and lessee should be bound, for they are expressly named, and that suit should be done to the mill as long as it continued to be the property of the lessor, his heirs or assigns. It has been said, that the thing to be done does not affect *the land. But it affects the profits of the land, and, generally speaking, they are considered the same thing as the land itself; for if the lessee in this case had had a mill of his own, he would still have been bound to grind the corn grown upon the demised premises at the lessor's mill, and the price paid for the grinding of such corn would be in the nature of a varying rent to the lessor, and a deduction from the profits of the lessee. But it is said that as the thing required to be done by the covenant is not to be done upon the land demised, but upon other land which might or might not continue to be the land of the lessor, it does not, therefore, respect the land demised, and, consequently, that the assignee cannot take advantage of the covenant. I am of opinion, however, that inasmuch as the thing to be done is to be done at a mill which belonged to the lessor at the time of making the lease, and which has always continued to belong to the owner of the reversion of the land demised, that the covenant to be implied from the *reddendum* is in the nature of a covenant to render a rent, and, consequently, that it is a covenant that runs with the land. It is said, that it is not in the nature of a rent, because it will not follow the reversion, for if the property in the mill and the reversion of the demised premises became severed, the service must be rendered to the owner of the mill, and not to the owner of the reversion of the demised premises. As long, however, as the mill and the reversion of the demised premises belong to the same person, the suit to the mill is a service to be rendered to

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the reversioner of the demised premises ; and so long, therefore, it would follow the reversion, and in that respect partake of the nature of rent. Now here, at the time of granting the lease, *the lessor was seised in fee of the land demised, and of the mill, and continued so seised of the latter, and of the reversion in the former, until his death, when his interest in both vested in the plaintiff, as devisee. From the time of granting the lease to the present time, the grinding of the corn at the mill was in the nature of a rent to the reversioner, issuing out of and rendered in respect of the demised premises. For these reasons, it appears to me that the assignee may, under the circumstances, take advantage of the covenant, and, consequently, that the plaintiff is entitled to the judgment of the Court.

BEST, J. :

I am of the same opinion. Here the reversion of the land demised and the property in the mill belonged to the lessor during his life, and at his death passed to his devisee, and they now continue united in him. At all times, therefore, the grinding of the corn at the mill in question was in the nature of a rent-service to the owner of the reversion of the demised premises. The general principle is, that if the performance of the covenant be beneficial to the reversioner, in respect of the lessor's demand, and to no other person, his assignee may sue upon it ; but if it be beneficial to the lessor, without regard to his continuing owner of the estate, it is a mere collateral covenant, upon which the assignee cannot sue. I think that the performance of the covenant in this case, in the events that have occurred, would always have been beneficial to the owner of the reversion of the demised premises, and to no other person, and therefore, that it is a covenant which runs with the land.

Judgment for the plaintiff.

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DOE ON THE DEMISE OF SIR R. SUTTON, BART., v.
P. F. HARVEY, ESQ., EXECUTOR OF A. D.
O'KELLY, ESQ.

(1 Barn. & Cress. 426—436; S. C. 2 Dowl. & Ry. 589.)

By Act of Parliament tenant for life was empowered to grant leases for any term not exceeding ninety-nine years, so as every such lease or leases be made to take effect either in possession, or immediately after the determination of the leases then subsisting thereof respectively, and so as in every such lease there be reserved, payable during the continuance of the term and estate thereby to be granted, the best and most beneficial yearly rent or rents. Part of the estate being let upon leases which, in due course, would expire on the 10th October, 1791, the tenant for life, in consequence of one bargain, executed at the same time two leases of that part of the estate, one bearing date the 4th May, 1787, for the term of thirty years, to commence on the 10th October, 1791, and the other bearing date 4th June, 1787, for the term of sixty-three years, to commence 10th October, 1821: Held, that this latter lease was void, inasmuch as it was not to take effect immediately after the determination of the subsisting lease.†

The first of these two leases reserved a rent of 270*l.*, the second reserved only 120*l.* By a clause in the second lease the tenant was bound to rebuild either before the expiration of the term granted by the first lease, or within the first year of the term granted by the second. *Semble.* That although the rents reserved by the two leases might be the most beneficial as between the lessor and lessee, yet they were not so between the tenant for life and the reversioner, and that, upon that account also, the second lease was void.

EJECTMENT to recover possession of five houses situate in Half-Moon Street, Piccadilly, in the county of Middlesex. At the trial before Abbott, Ch. J. at the Westminster sittings after Hilary Term, 1822, a verdict was found for the lessor of the plaintiff, subject to the opinion of the Court on the following case:

By an Act of Parliament of the 23 Geo. III. entitled "An Act for enabling William Pulteney, Esquire, to grant leases of certain estates in the county of Middlesex and city of London:" the following leasing power was given: "That it should and might be lawful to and for the said William Pulteney, from time to time, by indenture duly executed, &c. to lease unto any person or persons whatsoever all or any part of the said premises

† Observe the modification of the law on this point in 12 & 13 Vict. c. 26, s. 4.—R. C.

therein mentioned; to hold the said premises unto the persons unto whom or for whose benefit such lease should be *made, his executors, &c. for any term or number of years, so as such term or number of years did not exceed the term or space of 99 years from the date of executing such lease; and so as every such lease or leases be made to take effect either in possession or immediately after the determination of the leases then subsisting thereof respectively; and so as that in every such lease there be reserved to be payable, during the continuance of the term and estate thereby to be granted, the best and most beneficial yearly rent or rents, to be incident to the immediate reversion of the premises, that, considering the nature of the case, can be reasonably had or obtained for the same at the time of making such lease, without taking any fine, income, premium, or foregift, for or in respect of making such demises or leases." In virtue of this power, the said W. Pulteney, by an indenture of lease bearing date the 29th of May, 1787, demised the premises in question to the said A. D. O'Kelly, his executors, &c.; to hold from the 10th day of October, 1791, for the term of 30 years, at the yearly rent of 20*l.* 10*s.* for the first year of the said term of 30 years, and at the yearly rent of 27*l.* for the residue of the term, and which, in the lease, was stated to be the best and most beneficial rent that could be reasonably had or obtained for the said thereby demised premises. At the time of granting this lease there were existing leases of the same premises, bearing date the 30th of November, 1790, for several terms of years, which would expire on the said 10th day of October, 1791. By another indenture of lease bearing date the 4th of June, 1787, and which was agreed for at the same time as the lease of the 4th of May, 1787, by the same bargain, and in pursuance of which, both leases were executed at the same time, the said W. Pulteney *demised the same premises, to hold the same to said A. D. O'Kelly, his executors, &c. from the 10th day of October, 1821, for the term of 63 years, at the yearly rent of 120*l.*, which in the said lease was stated to be the best and most beneficial yearly rent, incident to the immediate reversion of the premises, that, considering the nature of the case, could be reasonably had and obtained for the same. In the

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lease of the 4th of June, 1787, is the following recital: "Whereas the messuages or tenements hereinafter demised are held by virtue of or under six several leases, five whereof being dated 30th November, 1730, will expire on the 10th October, 1791; and the other of the said leases, made to the said A. D. O'Kelly, bearing date the 29th day of May, 1787, for the remainder of a term of years, which will expire on the 10th day of October, 1821. And whereas the said messuages or tenements have been surveyed by S. Repys Cockerell, surveyor, who is of opinion, that it will be for the benefit as well of the persons entitled to the premises in reversion as of the person in possession, that on or before the expiration of the said last recited lease, the said messuages or tenements should be rebuilt." This latter lease contained a covenant to rebuild the demised messuage and premises before the expiration of the term granted by the lease of the 29th May, 1787, or within the first year of the term of 63 years thereby granted. The premises have not been rebuilt. The ejectment was served on the 26th of October, 1821. W. Pulteney, the lessor in the said leases granted to the said A. D. O'Kelly, died in the year 1820, having been in the receipt of the rents and profits of the said premises, under the lease of the 29th May, 1787, up to the period of his death. Sir R. Sutton, Baronet, the *lessor of the plaintiff, is now entitled to the premises in question, in case the Court should be of opinion that the defendant is not entitled to hold them. At the time of granting the lease of the 29th May, 1787, if the premises had been let for an entire term of 93 years, from the 10th October, 1791, the annual rent of 270*l.* would have been more than a fair annual rent for the first 30 years, and the rent of 120*l.* less than a fair annual rent for the residue of a term of 93 years. At the time of granting the lease of the 29th May, 1787, the premises were capable of standing 30 years; but it was the opinion of the surveyor, consulted at the time of completing the bargain and executing the said two leases, that it would be necessary and proper to pull down and rebuild them at such time as specified in the lease of the 4th June, 1787; and the calculation of the rents in the two leases of the 29th May, 1787, and 4th June, 1787, was made upon the supposition that the premises should

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be pulled down and rebuilt at such a time as specified in the lease of the 4th June, 1787; and taking into consideration the covenant to rebuild in that lease, the rents reserved under these two leases were, taking the whole as one bargain, the best and most beneficial yearly rents that, considering the nature of the case, could be reasonably had and obtained for the said premises at the time of making the leases of the 29th May, 1787, and 4th June, 1787.

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Denman, for the plaintiff:

The lease dated the 4th June, 1787, is void, not being within the leasing power reserved by the Act of Parliament. At the time when the lease of the 29th May, 1787, was executed, there was a subsisting lease which would expire on the 10th October, *1791. Now in *Winter v. Loveday*,† *HOLT*, Ch. J. says, that “where mention is made of leases in reversion in a power, this shall be intended of leases to commence after a present interest in being.” He afterwards says, “and when applied to a lease for years, it shall be intended of a lease which shall take effect after the expiration or determination of a lease in being.” The first lease, therefore, was a lease in reversion, to take effect upon the determination of the subsisting lease, and an execution of the power. The second lease was not to take effect till 30 years afterwards, and, consequently, is not within the power. But, secondly, the best and most beneficial rent was not reserved; for a much larger rent was payable during the first 30 years than during the residue of the term.

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Littledale:

The power is, that tenant for life may make leases to take effect in possession or reversion, so as they do not exceed in duration the term of 99 years. Now it is clear, that the tenant for life might make one lease for 99 years, to commence in 1791, and if so, why not two. The object of the power was, to prevent the land from being burdened with more than one term of 99 years. In *Rovey v. Smith* ‡ it was said, that where a power authorises the appointment of a fee that it might be executed

† Com. Rep. 37.

‡ 1 Vern. 84.

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at several times, that an estate for life might be appointed at one time, and the fee at another time. In *Snape v. Turton*, § upon a special verdict it appeared, that A. R. made a conveyance to the use of himself for life, with remainders over ; with a proviso, that if he made a conveyance of the premises in fee or *fee tail, that it should be a revocation of the former uses. He afterwards made a lease for years, and the next day granted the reversion in fee ; and it was resolved, upon special verdict, that although there was not one entire estate in fee conveyed, yet both being found, and that it was with an intent to make a fee to pass, that this was a revocation within the proviso ; and in *Reade v. Nash* † a similar question arose, but was not decided. These are authorities to shew, that the tenant for life may at different times and by different instruments execute a power, provided he does not exceed the term limited. The tenant, during the term reserved by the second lease of 1787, was to rebuild. The expense of rebuilding was to operate as a deduction from the rent, and the jury have found that this was the best rent that could be obtained.

(BAYLEY, J. : That may be so, as between the lessor and lessee, but not as between the tenant for life and reversioner.)

If there be any doubt as to that, the case ought to be submitted to another jury. It is true, that different rents could not be reserved during one term granted by one deed. But here there are two terms, and during the continuance of each term one rent only is reserved.

BAYLEY, J. :

This case admits of no doubt whatever. The power to lease, reserved to a tenant for life, is a power by which one man is enabled to dispose of the property of another, and, therefore, we ought to take care that the tenant does not exceed the power, and that he shall not do that indirectly which he cannot do directly. It is admitted, that there could not be two distinct rents *reserved in the same lease, and that, therefore, such a

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† Cro. Car. 472.

‡ 1 Leon. 147.

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reservation as that stated in this case would not be a valid execution of the power if found in one entire lease. Now I think that concession is decisive of the present question; for the restrictions imposed upon the leasing power would be effectually evaded, if that could be done by making two successive leases at one and the same time, in consequence of the same bargain, which could not be effected by one entire lease for the whole term. In substance, they form but one lease. The power enables the tenant for life "to lease for any term or number of years, so as such term or number of years do not exceed the term or space of 99 years, from the date or time of executing such lease; and so as all and every such lease or leases be made to take effect, either in possession, or immediately after the determination of the leases then subsisting thereof respectively; and so as that, in every such lease so to be made, there be reserved, to be due and payable, during the continuance of the term thereby to be granted, the best and most beneficial yearly rents, to be incident to the immediate reversion of the premises." Now in 1787, when the entire bargain was made, and when the two leases (which are in substance only one,) were executed, reserving two several rents, there was only one subsisting lease, the term of which expired on the 10th October, 1791; and if that be so, the lease which was to commence in June, 1821, was not a lease to take effect in possession, or immediately after the determination of the leases then subsisting. If the tenant for life might make two successive leases, he might make any other number; he might even make successive leases for every year of the term which the power enabled him to grant. Now that might be very *prejudicial to the reversioner, it might even make the clause of re-entry wholly inoperative. For by non-payment of rent, or breach of any of the covenants in the several leases, the lessee would only forfeit the subsisting term granted by the lease then running; and if he was turned out of possession, he might enter again under the next lease; whereas if there were but one lease, the entire term would be forfeited by any breach of the covenants. Suppose, in this case, the tenant for life had lived twenty-seven years after the first lease took effect, and then died, and that the tenant of the estate then refused

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to pay the high rent reserved by the first lease, the landlord might re-enter; but at the expiration of three years the tenant would be entitled to have the estate again at the lower rent, reserved by the second lease. But if the clause of re-entry was in one undivided lease, by entering, the owner of the estate would become possessed of it for the entire term. I am of opinion, that the executing of successive leases under one bargain, reserving different rents, is a fraud upon the power, in a case where, if the same rents were reserved by one entire lease, that lease would be therefore void. It is not necessary to intimate an opinion, whether, if the tenant for life had honestly made a lease for one term, he might subsequently, and in consequence of a different bargain, have made another lease for a further term. Here both the leases are made in consequence of one bargain. Then as to the rent, it is said that 270*l.* would have been more than the fair annual rent for the whole period; and that the rent reserved by the second lease would be less than the fair annual rent, unless the tenant were bound to rebuild. It is found as a fact, that these were the most beneficial rents that could be obtained. That may be true, as between the lessor and *lessee. The question is, whether they were the most beneficial to the reversioner. I think they clearly were not. If any doubt could be entertained as to that fact, I am so clearly of opinion that the lease is void on the first objection, that I cannot think it is worth while to send the case to another trial to ascertain whether this was the most beneficial rent, as between the reversioner and tenant for life. For these reasons, I think the lease of the 4th June, 1787, void, and that the lessor of the plaintiff is entitled to recover.

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HOLROYD, J. :

I am of opinion that the lessor of the plaintiff is entitled to recover, and that each of the objections is sufficient to avoid the second lease. It appears by the case that both the leases were made in consequence of one bargain, and were to commence respectively in October, 1791, and in the year 1821, and that the only subsisting lease was that which was to expire on the 10th October, 1791. Now two leases being made in consequence

of one bargain, and at the same time, the one to commence at the expiration of the lease in being, and the other not to commence till a later period, it is perfectly clear that the latter lease is not a lease to take effect in possession or reversion, immediately after the term granted by the then subsisting lease. It might have been a very different question, if the two leases had been made at different times, and in consequence of separate bargains; but it seems to me quite clear, the two leases having been made in consequence of the same bargain, although the whole term comprised in both leases does not exceed the term which the tenant for life had power to grant, that the latter lease is void. The second objection is, that even if this were but one entire lease, it would not be a lease agreeable *to the power, because different rents are reserved. The power requires that there be reserved and payable, during the continuance of the term thereby to be granted, the best and most improved yearly rent. Considering the object of the power, it is perfectly clear that whatever rent was reserved, should be reserved during the continuance of the whole term. It is admitted, indeed, that if there had been but one lease, the two rents could not have been reserved. They could not be the most beneficial to the reversioner, because they would put him in a worse situation than the tenant for life; and if the reservation would not be good in one lease, the making of the two leases is a fraud upon the power. It seems to me, therefore, that upon both grounds the second lease is void. As to the finding of the jury, that the rents reserved under the two leases made under one bargain were the most beneficial rents that could be obtained, that may be so, as between the person making the lease and the lessee; but in order to see whether it be so as between the tenant for life and the reversioner, we must look to the facts of the case, and the terms of the lease, independently of the opinion of the jury. Now it is perfectly clear, that, as between them, this was not the most beneficial rent. The former cannot make a bargain by which a larger rent is reserved at the first part of the term, and a less at the latter. I am, therefore, of opinion that the lease is void, first, because it is not to take effect immediately on the determination of the subsisting lease; and, secondly,

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because the best and most improved rent was not reserved during the continuance of the whole term.

BEST, J. :

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I am clearly of opinion that upon both grounds this lease is bad. It is said, that the power is *substantially complied with if the inheritance is not fettered with more than 99 years. This power, however, requires that it should take effect immediately after the determination of the subsisting lease. Now this lease does not take effect till thirty years after the expiration of the subsisting lease ; for the “ subsisting lease ” means that which subsists at the time of the grant of the new lease. There could be no valid lease under this power which did not commence in 1791, when the former lease expired. Even if I did not entertain a clear opinion upon that point, I do not think the case ought to go down to a second trial upon the other. It is said, that if there were no covenant to rebuild, the rent of 270*l.* would be too high during the term granted by the first lease, and too low during the term granted by the second ; but that it is not too low during the second term, because the tenant, during that term, is to bear the expense of rebuilding. Now although that may be a fair mode of measuring the rent between the lessor and the lessee, it is not so as between the tenant for life and the reversioner, because thereby the reversioner will have to bear the whole expense of rebuilding ; whereas if the tenant had been bound to rebuild at an earlier period, part of the expense would be borne by the tenant for life. This appears to me, therefore, a bungling contrivance to throw the burden of rebuilding upon the reversioner. On both grounds I think that this lease is void, and that the lessor of the plaintiff is entitled to recover.

Judgment for the lessor of the plaintiff.

SPENCER AND ANOTHER *v.* MARRIOTT, EXECUTOR
OF SARAH MARRIOTT, DECEASED.†

1823.

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(1 Barn. & Cress. 457—459; S. C. 2 Dowl. & Ry. 665; 1 L. J. K. B. 134.)

Covenant by the lessor that the lessee should hold the premises without any lawful let, suit, interruption, eviction by the lessor, or by or through the lessor's acts, means, right, &c. The lessor held, for a longer term, under a lease which contained a clause of re-entry by the original lessor in case the premises should be used for a shop. The under-lessee was not informed of this clause, and underlet to a tenant who incurred a forfeiture by using the premises for a shop, and the original lessor evicted him: Held, that this was not an eviction by *means* of the lessor within the meaning of the covenant in the under-lease.

COVENANT by the lessee against the executor of the lessor for breach of the following covenant for quiet enjoyment contained in a lease granted by the testator of certain premises in Guilford Street: "That the plaintiffs should and might hold the premises demised during the term granted, without any lawful let, suit, trouble, molestation, eviction, interruption, claim, or demand whatsoever, by or from the lessor, her executors, administrators or assigns, or any person or persons whomsoever, claiming or to claim, by, from, under, or in trust for her, them, or any of them; or by, or through, her or their acts, means, right, title, forfeiture, privity, or procurement." The declaration alleged, that at the time of making the lease to the plaintiffs, *the defendant's testator held the same by a lease for a longer term of years under the Foundling Hospital, which lease contained a clause of re-entry by the governors of the hospital, in case the premises should be used for any shop, warehouse, or other place for carrying on any trade, or in case any open or public show of business should be suffered therein; and also a covenant on the part of the lessees of the hospital, not to use or suffer the premises to be used for such purposes; that the plaintiffs, in ignorance of this clause contained in the lease of the hospital, underlet the premises to a person who exercised the business of an auctioneer in them; that the governors of the Foundling Hospital took advantage of the clause of forfeiture in their lease,

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† Confirmed by judgment of the *Atherton* (1872) L. R. 7 Q. B. 316; Exchequer Chamber in *Dennett v.* 41 L. J. Q. B. 165.—R. C.

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in consequence of such public business being carried on in the premises: the breach of covenant alleged was, that the plaintiffs were evicted from the premises by the *means* of the defendant's testator, to wit, by means of her neglecting and omitting to insert, or cause to be inserted in the said lease made by her to the plaintiffs, any covenant similar to the said covenant on the part of the lessees of the hospital, and of her neglecting and omitting to give the plaintiffs any notice of such covenant, or of the clause of re-entry aforesaid: and special damages were assigned. The declaration was demurred to generally.

Amos, in support of the declaration :

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No laches can be imputed to the plaintiffs for not investigating at the time of their taking a lease of the premises, the qualifications to which this lessor's title was subject. The authorities incline against the right of the lessee to an *inspection of the title of a lessor, *White v. Foljambe*,† *Gwillim v. Stone*.‡ The word “ means ” has a most extensive signification. In *Butler v. Swinnerton*,§ the word “ means ” in a covenant was held to have a much more extensive signification than the words “ act or procurement.” Besides, the covenant is to be construed most strongly against the covenantor.||

Per CURIAM :

If the defendant's testator has been guilty of any improper concealment whereby the plaintiffs have sustained damage, that may be the proper subject of an action on the case, but in order to maintain this action, it must be shewn that a breach of the covenant contained in the lease has been committed. The covenant is, “ that the lessee should hold the premises without any lawful eviction, interruption, &c. by or from the lessor, or by or through her acts, means, right, title, forfeiture, privity, or procurement.” Now the word “ acts ” means something done by the person against whose acts the covenant is made, and the word “ means ” has a similar meaning, something proceeding from the person covenanting. Now, the eviction was not pro-

† 11 Ves. 337.

‡ 3 Taunt. 433.

§ Cro. Jac. 656.

|| Shep. Touch. 162.

duced by any thing proceeding from the covenantor, but from the person in possession of the premises. Our judgment must, therefore, be for the defendant.

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Judgment for the defendant.

F. Pollock was to have argued in support of the demurrer.

WINSTONE THE ELDER AND WINSTONE THE YOUNGER
v. LINN.†

1823.

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(1 Barn. & Cress. 460—471; S. C. 2 Dowl. & Ry. 465; 1 L. J.
K. B. 126.)

Declaration upon an indenture of apprenticeship for breach of a covenant whereby the defendant, in consideration of a premium of 90*l.*, covenanted to instruct the apprentice in his trade, and provide him with diet, &c. Breach, that the defendant did not, after making the indenture, instruct the apprentice, but on the contrary refused so to do; and after the making of the indenture, to wit, on the 13th of July, refused then or at any other time to instruct him, and that the defendant did not, after the making of the indenture, provide the apprentice with diet, &c., but on the contrary thereof, on the 13th of July compelled him to quit his service before the expiration of the term. Plea as to the not instructing and not providing with diet and lodging before the 10th of July that he did instruct and provide him with diet and lodging till that time. Upon this plea issue was taken and joined. And as to the not instructing and not providing with diet and lodging upon and after the 10th of July, that the defendant was ready and willing to instruct and provide the apprentice with diet and lodging during the whole term, but that the apprentice would not, after making the indenture, serve the defendant, but frequently, and particularly on the 10th of July, refused so to do, and that on the 10th day of July the apprentice refused to do particular acts therein mentioned, which he was bound to do as such apprentice; and on the contrary thereof, against the positive orders of the defendant, absented and wholly withdrew himself from his service, declaring that he never intended to return again to his service, whereby defendant was prevented from instructing and providing him with diet and lodging according to the indenture. Replication, that after the apprentice had been guilty of the supposed breaches of duty as mentioned in the plea, to wit, on the 13th of July, he, the apprentice, returned to the defendant, and offered to serve him as such apprentice during the residue of the term, and requested him to receive him, and provide him with diet and lodging, but that defendant refused so to do. Demurrer, assigning

† Cited and followed by BLACK- (1875) L. R. 10 Q. B. 224, 226; 44
BURN, J. in *Westwick v. Theodor* L. J. Q. B. 110, 111,—R. C.

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for cause that plaintiff had by his declaration complained of a continued breach of covenant in not instructing, &c. the apprentice from the time of making the indenture till the commencement of the suit; and although the second plea answered to the whole time in the declaration after the 10th of July, yet that the plaintiffs had omitted to reply to such parts of defendant's second plea as related to not instructing, &c. the apprentice on the 10th of July, and between that time and the 13th of July: Held, that the plaintiffs' claim was not entire, but divisible, and covered every part of the time during which the master refused to instruct the apprentice, and consequently that there was no discontinuance: Held, also, that the replication was not a departure from the declaration, the gravamen of the complaint being that the defendant had compelled the apprentice to quit his service, and the replication shewing the manner in which he had so done it: Held, also, that the covenants in an indenture of apprenticeship are independent covenants, and consequently that acts of misconduct on the part of the apprentice stated in the plea were not an answer to an action brought for breach of the covenant by the master to instruct and maintain the apprentice during the term agreed upon by the indenture.

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COVENANT upon an indenture of apprenticeship, bearing date the 11th April, 1820, whereby the defendant, in consideration of a premium of 90*l.*, covenanted with the plaintiffs that he, defendant, would, during four years, instruct Winstone the younger in the *trade and business of a tobacconist, and also provide him with sufficient diet and lodging in the dwelling-house of the defendant. The declaration averred, that the son entered into the defendant's service, and then assigned a breach as follows; that the defendant did not, after the making of the indenture, instruct the apprentice in the trade of a tobacconist; but on the contrary thereof, had hitherto altogether refused so to do. And after the making of the said indenture, to wit, on the 13th day of July, wholly refused then or at any other time to instruct the said Thomas Winstone the younger in the said trade, contrary to the covenant. And that the defendant did not, nor would, after the making of the said indenture, provide the said T. Winstone the younger with suitable diet and lodging, although he, the said T. Winstone the younger, at all times after the making of the said indenture, was willing to take his meals with the defendant; but on the contrary thereof, he, the defendant, afterwards, to wit, on the 13th day of July, in the year aforesaid, compelled the T. Winstone the younger to quit his service before the expiration of the time agreed upon for the

said T. W. remaining therein, and refused to maintain and keep him, contrary, &c. Plea first, as to so much of the breaches of covenant as related to the not instructing the said T. Winstone the younger, and not providing him with diet and lodging *before* the 10th day of July; that he did instruct him till that time, and did provide him with suitable and sufficient diet and lodging, according to the tenor of the covenant. Upon this, issue was taken and joined. And as to so much of the breaches of covenant as related to the not instructing the said T. Winstone the younger, and not providing *him with diet and lodging *upon* and *after* the 10th day of July aforesaid; that he the defendant, was ready and willing to instruct the said T. Winstone the younger in the said business, and provide him with diet and lodging during the whole of the four years; but that the said T. W. the younger did not, nor would, after the making of the said indenture, serve the defendant as an apprentice in his said trade; but afterwards, on the 12th April in the year aforesaid, and on divers other days and times between that day and the said 10th day of July, wholly refused so to do; and on several of those days and times aforesaid refused to obey him in his said business, and to render him, defendant, a proper account of his monies from time to time entrusted to the said T. W. the younger, as such apprentice. And that when, on the 10th of July, he ordered the said T. W. the younger to add up the day-book used in his said business, which it was the duty of the said T. W. the younger, as such apprentice, to have done, he, the said T. W. the younger, refused so to do; and on the contrary thereof then and there, against the positive orders of the defendant, absented and wholly withdrew himself from the service of the defendant in his said business; he, T. W. the younger, then and there declaring to the defendant that he never intended to return again to such service, whereby the defendant was prevented from instructing the said T. W. the younger, and from providing him with diet and lodging, according to the said indenture, as he, the defendant, would otherwise have done. Replication, that after the said T. W. the younger had been guilty of the said supposed misconduct and breaches of duty as such apprentice as in the said second plea mentioned, and during the term in the indenture

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*mentioned, and before the exhibiting of the plaintiff's bill, to wit, on the 13th day of July, he, the said T. W. the younger, returned to the defendant, and tendered and offered himself to the defendant, to serve and obey him as such apprentice, and was then and there ready and willing, and offered to the defendant then, and during the residue of the said term, well and truly to perform all things in the said indenture contained on his part to be performed; and then and there requested the defendant to receive him, the said T. W. the younger, as such apprentice, and to continue to instruct him in the said trade of a tobacconist, and provide him with sufficient diet and lodging in pursuance of the indenture; but that the defendant then and there wholly refused to teach or instruct the said T. W. the younger in the said trade, and wholly refused so to do, or any longer to provide him with suitable and sufficient diet and lodging according to the indenture.

Special demurrer, assigning for causes, that although the plaintiff in the declaration complained of a continued breach of covenant, in not instructing the apprentice from the time of making the indenture to the commencement of the suit, as well as of a particular refusal to instruct him, alleged to have been made on the 13th July in the year aforesaid; and that the defendant would not, after the making of the said indenture, provide the said T. W. the younger with suitable diet and lodging; and, although the second plea of the defendant answers to the whole of the time in the declaration, on and after the 10th day of July in the year aforesaid, yet the plaintiffs have wholly omitted to reply to such part of the defendant's second plea, as relates to not instructing the said T. W. the younger, and not providing him with diet and lodging *on the said 10th day of July, or between that time and the 13th day of July, and have thereby wholly discontinued their action as to the latter period of time.

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E. Lawes, for the demurrer, contended, first, that the master of an apprentice was not bound to take him back into his service under the circumstances disclosed in the special pleas; and admitted by the replication: *Cuff v. Brown*.† So an apprentice

† 19 B. R. 621 (5 Price, 297).

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is not bound to return, if required so to do, after licence from his master to leave his service: *Anon.*† The contract is entire, and imports mutual conditions to be performed at the same time; and the plaintiffs having in every respect violated the contract, cannot sue the defendant upon it: *Kingston v. Preston.*‡ The defendant's performance is also prevented by the act of one of the plaintiffs.§ This is like the case of a brewer who, having repeatedly furnished bad beer, cannot complain of a refusal to deal with him: *Holcombe v. Hewson.*|| The case of *Weaver v. Sessions*¶ is very different from the present; the contract there not being entire, and there having been a liberty to buy of others; besides, the plea in that case did not connect the malt purchased with the orders given. The statutes respecting apprentices do not affect the case; and there is no distinction between contracts of apprenticeship under seal, and those between master and servant by parol. In several *Nisi Prius* cases between master and servant, misconduct on the part of the latter, and refusal to obey his master's commands, have been held sufficient to justify dismissal and nonpayment of *wages: *Robinson v. Hindman*,†† *Spain v. Arnott*,‡‡ *Williams v. Rice.*§§ Secondly, he contended that there was a discontinuance, as pointed out in the causes of demurrer to the replication; and if so, the plaintiff could not have judgment, whether the defendant's pleas be good or bad: *Tippet v. May.*||| The plaintiff having taken issue on the defendant's pleas as to his performance of the covenant from the execution of the indenture to the 13th of July, the whole of the first breach could not be considered as confined to a refusal to teach, &c. on that day. This case, therefore, differs from *Harris v. Mantle.*¶¶ Thirdly, there is a departure, inasmuch as the declaration states that the apprentice continued in the defendant's service to the 13th of July, and that the latter forced him to quit his service on that day; but the replication admits the contrary, and only relies on a

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† 6 Mod. 70.

‡ 2 Doug. 691.

§ 1 Roll. Abr. 455.

|| 11 R. R. 746 (2 Camp. 391).

¶ 6 Taunt. 154.

†† 3 Esp. 235.

‡‡ 2 Star. 256.

§§ Middlesex sittings after Easter Term, 3 Geo. IV. before Abbott, Ch. J.

||| 1 Bos. & P. 411.

¶¶ 3 T. B. 307.

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refusal to take him back on his return to the defendant on the 18th of July. A departure in pleading is matter of substance and ground of general demurrer: *Niblett v. Smith*,† and other cases cited in 2 Saund. 84 b. Lastly, the replication is bad, as concluding with a general prayer of damages. The plaintiffs should have new assigned: *Anon.*,‡ *Scott v. Dixon*.§ This is also ground for general demurrer.

BAYLEY, J.:

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There is not any pretence for saying that there is a departure in this case. It would have *been a departure if the plaintiffs had put their case in the replication upon a different ground from that contained in their declaration; but I am of opinion that they have not done so. The declaration charges generally, that the master, from the time of making the indenture, did not instruct and maintain the apprentice, and that he compelled him to leave his service on the 18th of July. The gravamen of the complaint is, that the master compelled the apprentice to leave the service. The replication then shews the mode by which the master compelled him to quit his service, viz. by refusing to receive him again after his misconduct. That is not taking a new ground, but supports and fortifies the declaration; it cannot, therefore, be a departure.|| I am also of opinion that there is no discontinuance in this case. It is said that the plaintiffs in their declaration claim an entire thing, and afterwards in their replication narrow their claim, instead of answering the whole of the defendant's second plea; and, therefore, that there is a discontinuance of the action as to that part of the claim which they have so abandoned. The charge in the declaration is, that after making the indenture, the defendant would not instruct the apprentice; and that on the 18th of July he wholly refused then, or at any other time, to instruct him; and that he would not provide him meals, &c. It is not one entire claim, but divisible, and covers every part of the time during which the master refused to instruct the apprentice. The defendant's second plea affects to answer the claim of the plaintiffs, as to all the time

† 4 T. R. 504.

‡ 6 Mod. 70.

§ 2 Wils. 41; Saund. 299 a.

|| Co. Litt. 304 a; 2 Saund. 84 a.

after the 10th of July; now that is fully answered, by shewing that the *apprentice made a subsequent tender of his services, whereupon the master ought to have taken him back. The fallacy of the argument consists in considering this as one entire claim for one entire period of time, instead of a divisible claim. I am also of opinion that the plaintiffs are entitled to the judgment of the Court upon the more important question in the case. That question is whether the master is at liberty to insist that the indenture is no longer binding upon him, because the apprentice has unwarrantably refused to obey the commands of his master. By the indenture, the master covenants that he will for four years instruct and maintain the apprentice. Upon this record we are not at liberty to assume that there are any other covenants in the indenture than those set out. Such indentures generally contain reciprocal covenants by each party. Those covenants are not dependent, but are mutual and independent, entitling each party to his remedy for a breach of them. The master, therefore, is liable to an action for a breach of the covenant to instruct and maintain the apprentice during the term agreed upon. If the second plea be good in this case, there is a sufficient answer to this action. In that plea he relies upon a disobedience of orders, and upon the circumstance that the apprentice withdrew himself from his service, and declared his intention never to return. And if he had continued to absent himself to the end of the term, there can be no doubt that that would have been an answer to the action; but it appears by the replication that the apprentice *did return*, and offered to serve the master during the remainder of the term, and that the latter refused to receive him. I have entertained some doubt whether the replication ought not to *have averred this offer to have been made within a reasonable time; but I am now satisfied that it lay upon the defendant to have rejoined that an unreasonable time had elapsed before the offer was made. That being so, the question arises upon these pleadings, whether disobedience of orders or other acts of misconduct by the apprentice, will entitle the master to put an end to the contract of apprenticeship. I am of opinion that it does not. If the parties had intended that the master should have such a power, they might have provided

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for it by the express terms of the deed. Not having done so, we must conclude that it was not intended that he should have any such power. In the case of parish apprentices, the Legislature by 20 Geo. II. c. 19,† expressly provided, that the indentures may be discharged upon complaint made by the master to two justices, touching the misconduct of the apprentice in his service. The Legislature must have thought, therefore, that without such an express provision, the master of an apprentice would not, at common law, have the power of putting an end to the contract in case of the misconduct of the apprentice. The cases which have been referred to in argument, arising out of the relation of master and servant, do not apply to the present. In the case of apprentices a premium is usually given, in consideration of which the master expressly contracts to instruct and maintain the apprentice during a given term. The premium is a consideration for the instruction and maintenance during the entire term. Where the ordinary relation of master and servant subsists, it is a condition implied from the very nature of the contract, that the master should only maintain the *servant so long as he continues to do his duty as servant; and the contract is to endure for a reasonable time if no specific time be fixed, and is determinable by a reasonable notice. For these reasons I am of opinion that the plaintiff is entitled to the judgment of the Court.

HOLROYD, J. :

I think that the formal objections to the replication, on the ground of departure and discontinuance, have been already fully answered. With respect to the general question, I am also of opinion that the plaintiff is entitled to judgment. The cases which have been referred to in argument, and which have arisen out of the relation of master and servant, do not bear upon the present question. Under that contract, the master, in consideration of the servant performing his service, undertakes to maintain him and pay him wages. The moment the latter ceases to do his duty properly as a servant, the consideration for the maintenance and wages fails. The relation that subsists between a

† Repealed 38 & 39 Vict. c. 86, s. 17.

master and an apprentice is very different : under that contract all the acts are not to be done by the apprentice, but the master agrees to give him instruction ; and the great object of the contract is, that a young person entering into life should receive instruction and protection from the master. The latter has a greater control over his apprentice than over a mere servant, for he may even correct his apprentice. The master, too, usually receives a premium, which is paid him as a consideration for instructing the apprentice during the term agreed upon. If the argument urged on the part of the defendant were to prevail, the effect would be to deprive the apprentice of that protection which it was the object of the indenture *to give him, and to leave him at liberty to go where he pleased. The statute relative to parish apprentices tends strongly to shew, that at common law the master had no power to put an end to the contract of apprenticeship. It is true, that this is not an indenture within the statute, and it must therefore be construed as if the statute had never passed ; but the statute nevertheless shews, that the understanding of the Legislature at that time was, that under indentures in the common form, the master had no right to put an end to the contract in consequence of the misconduct of the apprentice.

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BEST, J. :

I entirely concur in the opinions pronounced by my learned brothers. The argument is, that if the apprentice be guilty of a single act of misconduct, or be absent from the service of the master for two days, he is to lose the benefit of the instruction to which he was entitled by the indenture, and for which the premium of 90*l.* was paid ; and it has been said, that the act of going away, accompanied with the declaration that he would not return, deprived him of the protection of his master. But it would be most unjust if a single act of misconduct were to deprive a young person of the protection and instruction which he was to receive in virtue of the indentures, and for the continuance of which for a given time a valuable consideration has been paid. The master has at common law a complete remedy, if the apprentice misconducts himself, by an action for a breach

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of the covenants. The provisions contained in the statute relative to parish apprentices shew, that at common law the master could *not determine the contract, if the apprentice misconducted himself. I am, therefore, of opinion that the plaintiffs are entitled to recover.

Judgment for the plaintiffs.

K. B. EASTER TERM.

1823.
April 17.
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DRAKE v. MARRYAT.

(1 Barn. & Cress. 473—477; S. C. 2 Dowl. & Ry. 696; 1 L. J. K. B. 161.)

In an action against an underwriter upon goods which sustained sea-damage: Held, that although the defendant was a subscriber to Lloyd's, a certificate granted by their agent, resident abroad, was not admissible to prove the amount of the damage.

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ASSUMPSIT on a policy of insurance on sugars, at and from Matanzas to port or ports of discharge in Europe between Saint Petersburg and Bordeaux, *both included. The sugars were warranted free from average under 5*l.* per cent. At the trial before Abbott, Ch. J. at the London sittings after last Term, it appeared that the vessel discharged at St. Petersburg, and that the sugars had been damaged by perils of the sea. In order to prove damage to a greater amount than 5*l.* per cent., the plaintiff tendered in evidence a certificate of the agent to Lloyd's, resident at Petersburg, signed by him after surveying the sugars. The following admissions were entered into by the parties. The merchants, shipowners, and underwriters in London, have been for centuries in the habit of meeting at Lloyd's for the purpose of transacting the business of insurance. The management of the affairs at Lloyd's has always been conducted by a committee of nine members appointed at a general meeting of the subscribers; the authority of the committee is vested in them by a deed, executed by such of the subscribers as vote in the election of the committee; the committee, in pursuance of this deed, nominate agents at nearly all the out-ports in the United King-

dom, and all foreign ports over the world with which any trade is carried on ; printed instructions are sent out to the agents on their appointment, requiring them to communicate to the committee all the information that they can collect regarding trade and commerce generally, and all losses, misfortunes, and accidents which may happen to ships or property within the district for which they are respectively nominated. The printed instructions transmitted to the agents contain the following passages. "No power from the subscribers to Lloyd's can divest the assured, their agents or assigns, or the masters of vessels, of that right over property which the law has given them ; but it is presumed, that *the assured or their representatives will readily avail themselves of the assistance of an agent, who is appointed by the general body of subscribers to act on their behalf, and whose co-operation will facilitate the settlement of loss or average with the underwriters. When called upon by consignees to ascertain damage, the agent is to act as a surveyor only, and in this capacity to require the presence at surveys of the master of the vessel by which the goods have been imported, who is to sign the certificate of the damage. The agent is further to see that the sound part of every package is separated from the damaged, and particularize the quantity of each in his certificate, taking care in the first instance to satisfy himself that the goods were properly stowed, and that the damage was occasioned by sea water whilst on board. The sale must take place within a reasonable time from the period of landing, otherwise the underwriters will be exonerated ; and in such case the agent is not to act. The agent is not to make up or sign any statement of average, either general or particular, as representative of the underwriters leaving that to be adjusted between them and the assured upon the documents which he furnishes." It was further admitted, that the persons by whom this policy was effected and the defendant were at the time subscribers to Lloyd's, and had executed the deed from which the committee derived their authority. The question meant to be tried was, whether the certificate signed by Lloyd's agent was admissible in evidence against the defendant. The LORD CHIEF JUSTICE held it inadmissible and nonsuited the plaintiff, with leave to move to enter a verdict in his favour.

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Campbell accordingly now moved, and contended that the evidence ought to have been received. From the limit put upon the authority of Lloyd's agents, it must be admitted that they cannot bind the underwriters by adjusting a total loss or settling an average; but they are appointed expressly to survey goods that are damaged by perils of the sea, and to grant a certificate of the quantum of the damage. In granting such a certificate, therefore, they are acting within the scope of their authority, and a certificate so granted is good evidence against their principals. If the defendant himself had signed this certificate, he would have been bound by it, and it seems equally binding upon him, though signed by his agent. Lloyd's agents always authoritatively interfere in foreign ports upon any misfortune happening to property insured; they are understood to represent the underwriters; upon the certificates which they grant, losses are constantly settled; and it would be injurious to commerce if any act which they are directed by their instructions to do, could, when disagreeable to the underwriters, be treated as a nullity. In *Read v. Bonham*[†] it appears to have been thought, that an agent for Lloyd's resident at Calcutta might even receive notice of abandonment, which would be extending his authority far beyond what is necessary for the plaintiff in this instance.

Per CURIAM :

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If the agent had been employed by both parties to make a certificate of the loss, that might have been conclusive between them. But that was not so, and in the very instrument of appointment, the agent *is spoken of as one whose co-operation will facilitate the settlement of loss or average, not as one who had authority to settle it himself. The certificate was, therefore, properly rejected. The instructions to Lloyd's agents could not have been before the Court of C. P. in *Read v. Bonham*; for, by these instructions it is expressly declared, that "in no case is the agent to accept an abandonment of either ship or goods as the representative of the underwriters."

Rule refused.

[†] 23 R. R. 587 (3 Brod. & B. 147).

THE KING *v.* THE COMMISSIONERS OF SEWERS
FOR ESSEX.†

1823.
April 17.

(1 Barn. & Cress. 477—484; S. C. 2 Dowl. & Ry. 700; 1 L. J. K. B. 169.)

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In the absence of a usage to the contrary, all those who enjoy the benefit of a sea-wall are bound to repair and maintain it. But, by evidence of usage, the obligation may be shown to lie upon individuals. Even in that case, if the individual is not in default, the damage done by extraordinary tempest must be borne by the general body of proprietors. But the Court will not, at the instance of an individual who is in default in making the repairs which he is bound to make, grant a mandamus calling upon the other owners to contribute, on the suggestion that the repairs have become necessary by reason of an extraordinary tide and tempest.

IN Michaelmas Term last *Berens* obtained a rule *nisi* for a mandamus to the commissioners of sewers acting within the limits between Rainham bridge and Mucking mills, and the meadow grounds between Childerditch ponds and Purfleet mills, in the county of Essex, commanding them to reimburse Anthony Harding a sum of money expended by him in the repair of the damage done on the 3rd of March, 1820, to the sea-wall abutting on certain lands of the said Anthony Harding, in the level of Grays Thorock in the county of Essex, and within the jurisdiction of the said commissioners. The affidavits in support of the rule stated the following facts: A. Harding, on the 3rd of March, 1820, was owner and occupier of 147 acres of land in the level of Grays Thorock, which he had then lately purchased of one Carr; the land was bounded by 151 rods of sea-wall abutting on the river Thames, in a position which *rendered it more liable to accidents than any other part of the sea-wall in the level. The whole level consists of 1671 acres; and the whole length of the sea-wall is 931 rods. All the lands in the level derive an equal benefit from the sea-wall; but the commissioners of sewers have always assessed the owners of land to the repair of so much of the sea-wall as abuts upon their own lands respectively; so that Harding, although possessed of only one-eleventh part of

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† Compare *Reg. v. Commissioners of Sewers for the Levels of Fobbing, &c., Essex* (1864, 1886) 14 Q. B. Div. 561; 11 App. Cas. 449; 53 L. J. M. C. 113; 56 L. J. M. C. 1.—R. C.

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the lands, is obliged to support one-sixth part of the sea-wall of the whole level. On the 3rd day of March, 1820, an extraordinary high spring tide, accompanied by a violent tempest, did extensive and extraordinary damage to upwards of 100 rods of Harding's sea-wall, so as to occasion great danger and fear of a breach, whereby the whole, or the greater part of the level would have been flooded. Immediately before the said storm, the sea-wall of Harding was in the usual and fair state of repair, as good as it had ever been for eight years preceding, and such as would have resisted the ordinary flux and reflux of the waters. Soon after the storm, the marsh-bailiff ordered Harding to repair the wall, which he did at great expense, and afterwards presented a memorial to the commissioners of sewers for the level, praying to be reimbursed, which, after consideration, was dismissed. The following facts were stated in affidavits in answer: by the constant and immemorial usage and custom of the level of Grays Thorock, the respective sea-walls abutting upon the river Thames, and every part thereof, are, and constantly and immemorially have been, kept in repair under the presentments of the sewers juries, and the concurrent orders of court from time to time made thereon, at the sole, exclusive, and individual *costs and charges of the several and respective owners and occupiers of all such respective lands as abut by frontage upon the river Thames, upon which such sea-walls are actually situate, and not by any rate or assessment made upon or at the public charge of the said level, save only and except that a public sluice, within the level by which the lands of Harding, in common with others within the level, are drained, and derive equal and proportional benefit, hath, as hath also the sea-wall at the head of the said sluice, been immemorially kept in repair by the marsh-bailiffs at the public expense of the level. The marketable value of all estates within the level is greatly influenced by the extent of sea-wall which the owners of them have to repair. At an annual general court of sewers, holden at Grays Thorock on the 8th of July, 1819, the jurors for the level made the following presentments: "That Geo. David Carr, Esq. (of whom A. Harding purchased,) and his trustees make good their chalking and piling from end to end of his wall by the 1st day of October next; penalty 60l.

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That they make good his breasting from end to end of his wall by the 1st day of January next ; penalty 3*l*. That they fix a new third tier of piles fifteen rods at the seven-acre marsh, and fill up with chalk by the 1st of January next ; penalty 38*l*." An order was thereupon made by the court of sewers ; the marsh-bailiff gave due notice of the presentment and order, but neither Carr nor his trustees, nor Harding, who succeeded them as owner of the lands where the works were required to be done, complied with the presentment and order at any time previous to the high wind and spring-tide ; but the said work was only partially and incompletely done when the high wind and *spring-tide happened. The damage done by the said spring-tide and high wind might have been fully repaired for 10*l*. If the sea-wall upon Harding's land had been previously maintained in a proper state of repair by the front or breasting thereof being kept up as it ought to have been, according to the presentment of the sewers' jury in that behalf, no damage whatever would have been likely to have accrued to the wall from the spring-tide and high wind ; and whatever partial damage accrued to the wall on that occasion, arose from the imperfect and bad state of repair in which the wall had been generally allowed to remain, and then was, and not from the effect of any unusual tide or wind. The monies expended by Harding for chalk and piling, were necessarily expended for the purpose of putting his sea-wall into a general state of repair, under the presentments of the sewers' jury of the year preceding, and the order of court thereupon, and not for making good any especial or particular damage alleged to have arisen from the said spring-tide and high wind ; and such expenditure for chalk and piling would not have been necessary, had the same care been previously bestowed upon the reparations of the sea-wall belonging to Harding, as had in fact been bestowed upon the reparations of the sea-walls belonging to other persons within the level, and as was required by the presentments of the jurors, and the concurrent orders of the court of sewers held on the 8th day of July in the preceding year. And the sea-wall of Harding's lands within the level has always, during the memory of living witnesses, been maintained at the sole cost and charges of the several owners and occupiers for the time being of the said lands.

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Tindal and Brodrick now shewed cause :

Callis, p. 114, enumerates nine ways in which a man may be bound to the repairing of a sea-wall, and amongst them are, "by frontage; by ownership; by prescription; by custom; and by tenure." These five ways are all applicable to Harding. The front of his lands joins the river. He is owner of the wall. It has been immemorially the custom in the level of Grays Thorock, that every land owner should repair the sea-walls upon his own land, and the wall in question has, as long as living memory goes, been repaired by the owners of Harding's land. There is but one exception by which a case of this nature can be taken out of the general rule, viz. where the party is unable to repair, and then the whole level must of necessity bear the burthen: Callis, p. 144, citing *Keighley's* case.† It will, perhaps, be attempted to shew that this comes within the sixth exception mentioned by Callis. "If the sea at the spring tide, or at extraordinary casual swelling tide of floods, have broken down the fences and overthrown the banks and drowned the county without any default in the party who was tied down to have repaired the same, the level shall in this case make up the breach." But here the wall was not broken down, nor was there an actual breach in it; neither was the level overflowed, and the mischief that did happen was not without default of the party. The party applying for this writ does not state that his wall was in actual good repair, but merely, that it was "as good as it had usually been for some years." What that usual state of repair was, may be collected from the presentments of the sewers jury in the year preceding, *which were never traversed. In addition to which, it is now expressly sworn, that if the wall had been repaired as those presentments directed, it would not have been injured by the high tide and wind on the 3rd of March, 1820. *Keighley's* case distinctly shews, that the extraordinary force of the tide is no excuse where the party bound to repair is in fault; and that case explains an opinion expressed by WALMSLEY, J. in *Rooke's* case,‡ in which he was supposed to have declared, that since the Statute of Sewers§

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† 10 Co. Rep. 139.

‡ 5 Co. Rep. 100.

§ 23 Hen. VIII. c. 5.

the whole level is bound to repair, although before that time some one might have been bound by prescription to maintain the wall. It appears, that it was meant to be applied only where the party was without default. In *Rex v. Commissioners of Sewers for Somerset*,† it appears that the wall was washed down without default in the owners of the lands on which it stood.

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Scarlett and Berens, contra :

The question of law raised in this case is very important to the owners of property bounded by a sea-wall. If it be held that each person is bound to repair the wall for the whole extent of the frontage of his land, it may lead to great hardship. Suppose the case of 1000 acres of land all preserved by the same wall; the owners of 500 acres may have only five yards of wall, whilst the owner of a much smaller portion may have 1000 yards; that may be washed down, the whole of his estate may be destroyed, and yet he may be compelled to repair the wall for the benefit of others. In cases of public nuisance where all *the King's subjects are concerned, the Court will not look at the quantum of property, in respect of which the burthen is imposed. But it may be otherwise where the dispute is between two or more individuals. Callis, p. 122, cites the Year Book‡ to this effect, that frontagers and those who have free fishing in a river shall jointly perform the duty of repairing.

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(ABBOTT, Ch. J.: The general question is not open. It is clear upon the affidavits, that Harding is bound to repair generally, the present question depends upon the extraordinary damage, and that involves the previous state of the wall.)

The passages cited on the other side from Callis, all refer to the law as it stood before the 23 Hen. VIII. c. 5. He only means by them, that frontagers and owners might be bound, and perhaps actually were bound at common law before the Statute of Sewers was passed.

(ABBOTT, Ch. J.: Can you contend that the liability of persons bound to repair was altered by that statute ?)

† 4 R. R. 659 (8 T. R. 312).

‡ Ass. pl. 15.

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Unless they were bound by prescription it may have that effect. Then as to the extraordinary damage, it is stated in the affidavits in support of this application, that at the time of the accident the wall was in the usual and fair state of repair, as good as it had ever been during the last eight years, and such as would have resisted the ordinary flux and reflux of the waters. Now it is admitted, that on the 3rd of March, 1820, there was a high spring tide and a violent wind; there is not, therefore, any reason to suppose that the wall would have been injured by any ordinary tide and wind.

[484] ABBOTT, Ch. J. :

It is too late now to discuss the general question which it has been attempted to raise in this case. By law, the obligation to repair sea-walls may be cast upon particular individuals, or upon all the owners of land in the level. Upon which class the burthen is to fall in each particular case, must depend upon usage if any can be established. If no usage has prevailed, all those are liable who enjoy the benefit of the work. Even where an individual is bound by prescription or otherwise to repair, still if there be no default on his part, and damage is sustained by an extraordinary flood or tempest, the whole level must bear the loss and be contributory to the repairs. If upon the affidavits the question of default were doubtful, I think that a mandamus should be granted. How then does that question stand? On the one hand it is sworn, not that the wall was in good repair, but that it was in its usual and fair state; on the other hand it is sworn, that the repairs required by the sewers jury of the year preceding had not been completed, and that no injury would have been done by the tide and wind on the 3rd of March, had the wall been in a good and sufficient state of repair. Upon these affidavits it is impossible to say that Harding was not in default; the rule must therefore be discharged, and as this is a motion against a public body, I think that it should be discharged with costs.

Rule discharged with costs.

THE KING *v.* RICHARD DAYRELL AND ANOTHER,
JUSTICES OF THE PEACE IN AND FOR THE COUNTY OF
BUCKINGHAMSHIRE.

1823.
April 18.
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(1 Barn. & Cress. 485—488; S. C. 2 Dowl. & Ry. 689.)

The Court of K. B. will not grant a mandamus commanding justices of the peace to do an act of which the validity is doubtful.

A RULE had been obtained, calling upon the defendants to shew cause why a writ of mandamus should not issue, commanding them to grant a warrant of distress, for enforcing payment from one John T. A. Reid, clerk, rector of Lickhampstead, in the said county, of the sum of 18*l.* 8*s.*, to the surveyor of the highways of the parish of Lickhampstead, being the amount of composition in lieu of statute duty, due from the said J. T. A. Reid, as occupier of the tithes of the said parish. It appeared by the affidavits, that the sum was duly fixed and ascertained, if the rector was in the occupation of the tithes. As to that, it was sworn by Reid, and not controverted, that he did not hold, occupy, or take in kind, nor had ever held, occupied, or taken in kind, any of the tithes, but had always let the same by parol, to the farmers or occupiers of the respective lands where such tithes arose; that the rents or sums of money payable to him by the farmers in respect of the tithes, were reserved and received by equal half-yearly payments, the first of which was due on Lady-day in every year; that the tithes were not bargained and sold when at maturity, but were let prospectively, and without reference to any specific mode of cultivation; that the rector had not any team, draught, or plough, and never used the highways of the parish, as occupier of the tithes. The composition money was *duly demanded, and Reid refused to pay it; and application being made to the defendants for a warrant of distress, they refused it, and assigned, as a reason for their refusal, that they thought Reid was not liable to the performance of statute duty, or payment of composition; for, in consequence of his having let or compounded with the farmers for his tithes, the whole statute-duty devolved upon the farmers, as occupiers of the tithes.

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Dover shewed cause against the rule :

Under the circumstances disclosed by these affidavits, it is quite clear, that the rector was not an occupier of tithes, within the meaning of the 13 Geo. III. c. 78,[†] and 34 Geo. III. c. 74.[‡] He never took the tithes in kind, nor did he bargain and sell them to the farmers from time to time, when they were actually in existence. They were let from year to year, at a certain rent, without reference to the mode of cultivation. Under such a contract, the relation of landlord and tenant subsisted between the rector and the occupiers of the land in his parish. He cannot, therefore, be said to occupy the tithes, and if that be so, clearly he is not within the words of the statutes, nor is he within the spirit of them : the primary ground of rating to the repair of highways, is the use which the party charged is supposed to make of them, in the enjoyment of his lands, &c. in the parish. In the present case, the rector made no use of the highways, for the purpose of taking or occupying his tithes, for he kept neither team, draught, nor plough.

He was then stopped by the Court.

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Marryat and Marriott, contrà :

The 45th section of the 13 Geo. III. c. 78,[†] shews that the ground of rating is not the quantum of use made of the highway, but the value of the property occupied by the party charged. The whole question is, whether the rector be an occupier or not. It has been held, that where he receives an annual composition, it makes no difference that he receives it at two days; that circumstance, then, may be dismissed from the consideration of the Court. Receiving money in lieu of tithes is in the nature of tithes : *Rex v. Lambeth*.[‡] *Rex v. Bartlett* § shews that the parson has been rated to the poor for tithes which he had let to the occupiers of land. The parson may, therefore, in this instance, be considered as an occupier of the tithes, and, consequently, is liable to pay the rate in question.

[†] Repealed 5 & 6 W. IV. c. 50, s. 1.

§ Vin. Abr. Poor Rate (F), pl. 14.

[‡] 1 Str. 525.

ABBOTT, Ch. J. :

It is manifest, that if we granted a mandamus, commanding the justices to issue a warrant of distress, the rector would bring an action to try the validity of that which we had ordered to be done. I have always felt great reluctance to order any thing to be done by a magistrate which may subject him to an action, of which the issue is doubtful. If the fear of an action appeared to be a mere pretence, and to have no reasonable foundation, we should not listen to it; but here there is so much doubt, that I am of opinion we ought not to grant a mandamus. The 43 Eliz. c. 2 goes much farther than the Highway Acts; that makes all local visible property liable to be rated, and parsons and vicars are rateable under it *eo nomine*. I say no *more than that doubts exist, for I would not prejudge a question which may hereafter be discussed. Whenever such a question shall be brought before us, it will be our duty to decide it. At present I give no judicial opinion upon the point, but think that this rule must be discharged, because I am by no means satisfied that the magistrates would not be rendered liable to an action, by issuing a warrant to distrain for the rate in question.

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BAYLEY, J. :

I am of opinion that this case admits of the doubt which has been raised by the magistrates. It does not follow that the parson is liable under the Highway Act, because he is so under the 43 Eliz. c. 2. Under the latter he is not liable as occupier; tithes, generally, are not mentioned in that Act, although tithes impropriate are. But a parson is rateable to the poor as such : *Rex v. Turner*.† In the case of *Rex v. Lambeth* there was not a letting of the tithes, but a bargain *pro hac vice*; there may be a great difference between that and a letting from year to year. On account of the great doubts which exist upon this subject, I think that we ought not to grant a mandamus.

Rule discharged.‡

† 1 Str. 77.

‡ Holroyd and Best, JJ., had left the Court.

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April 23.

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THE KING v. RICHARD BOWER.

(1 Barn. & Cress. 492—500; S. C. 2 Dowl. & Ry. 761; 1 L. J. K. B. 174.)

Where a charter directed that out of certain persons to be nominated in a particular mode, "the mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants of the borough for the time being, (they being for that purpose congregated and assembled together,) or the greater part of them as should be so congregated, might, by the greater part of the voices of them so assembled, choose one to be mayor:" Held, that a majority of each definite body must be present in order to make a valid election.

INFORMATION in the nature of *quo warranto* against the defendant for exercising the office of mayor of the borough and town of Weymouth-and-Melcombe-Regis, in the county of Dorset. The defendant pleaded, that George the Third, by his letters patent, under his great seal of the United Kingdom, bearing date, &c. after reciting as therein recited, for himself, his heirs and successors, did will and declare, that the said borough or town from thenceforth should be a free borough and town of itself, and that the mayor, aldermen, bailiffs, burgesses, and commonalty of that borough and town, and also all and singular the burgesses and inhabitants of the same borough and town, by whatsoever name or names they or their predecessors theretofore had been incorporated, and their successors from thenceforth for ever, should be a body corporate, by the name of "The mayor, aldermen, bailiffs, burgesses, and commonalty of the borough and town of Weymouth-and-Melcombe-Regis, in the county of Dorset;" and that from thenceforth there should be within the borough and town aforesaid, one of the burgesses or inhabitants of that town, which should be, and should be named mayor of the borough and town aforesaid; and that also there should be divers men of the borough and town aforesaid, which should be and should be named aldermen of the borough and town aforesaid; and that, likewise, there should be two other men of the borough and town aforesaid, chosen in form thereafter in the said letters patent mentioned, *and which should be and should be called bailiffs of the borough and town aforesaid, and that there should be within the borough and town aforesaid twenty-four other men, chosen in form also thereafter in the said letters

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patent mentioned, which should be and should be called chief and principal burgesses of the borough and town aforesaid, and should be assistant and aidful unto the mayor, aldermen, and bailiffs of the same borough and town for the time being in all causes, affairs, businesses, and matters whatsoever, touching or by any means concerning the borough and town aforesaid. And the said late King did thereby further grant unto the aforesaid mayor, aldermen, bailiffs, burgesses, and commonalty of the borough and town aforesaid, and unto their successors, that the mayor and aldermen of the borough and town aforesaid for the time being, or the greater part of them, of whom he willed the mayor for the time being to be one, should have full power and authority to choose and name, on the feast day of St. Matthew the Apostle, in every year, in the guildhall of the borough and town aforesaid or in some other convenient place within the borough and town aforesaid, being congregated and assembled together, four of the burgesses or inhabitants of the borough and town aforesaid, whether the same or any of them were or had been aldermen, bailiffs, or principal burgesses or not, out of which four so to be named and chosen, the mayor, aldermen, bailiffs, principal burgesses and other burgesses and inhabitants of the borough and town aforesaid for the time being (they being also for that purpose there upon the same day congregated and assembled together), or the greater part of them as should be so congregated, might and should *have full power and authority, by the greater part of the voices of them so assembled together, to choose and make one to be the mayor of the borough and town aforesaid, which said letters patent were duly accepted and assented to: the plea then stated, that on the feast day of St. Matthew the Apostle, that is to say, on the 21st day of September, in the second year of the reign of our lord the now King, one James Willis Weston, Esq., the then mayor of the said borough and town, and divers, to wit, eight aldermen of the said borough and town, being the greater part of the aldermen of the same borough and town, did duly congregate and assemble together within the guildhall of the borough and town aforesaid, for the purpose of choosing and naming four burgesses or inhabitants of the borough and town aforesaid, to the end that one of such four

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might be named and chosen mayor of the said borough and town for the year then next following. And the said mayor, and the greater part of the said aldermen of the said borough and town, being so congregated and assembled together as aforesaid, did then and there choose and name the said Richard Bower, then being an inhabitant of the said borough and town, and three other inhabitants of the said borough and town for the purpose aforesaid. And the said Richard Bower further saith, that on the same day and year last aforesaid, the then mayor of the said borough and town, and certain, to wit, eight aldermen, two bailiffs, twenty principal burgesses, and two hundred other burgesses, and six hundred other inhabitants of the borough and town aforesaid, for the time being, were duly congregated and assembled together, within the guildhall of the borough and town aforesaid, for the *purpose of electing and choosing a mayor for the said borough and town, out of the said four persons so named and chosen as aforesaid; and being so congregated and assembled together as aforesaid, for the purpose last aforesaid, the said then mayor and the greater part of the said aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants of the said borough and town, so assembled as aforesaid, for the purpose last aforesaid, then and there did choose and make, elect and appoint him the said Richard Bower, then being one of the said four inhabitants so chosen as aforesaid, to be mayor of the said borough and town for the year then next ensuing, and from thenceforth until another mayor should be elected, appointed, and sworn. Replication, that at the time of the said supposed making of the said Richard Bower, to be such supposed mayor, as in the said plea mentioned, a majority of twenty-four principal burgesses of the said borough and town were not assembled and congregated together in manner and form as the said Richard Bower hath, in and by his said plea in that behalf, alleged; but ten only of such principal burgesses, and no more, by means whereof the said supposed elective assembly, at which the said Richard Bower is in and by the said plea supposed to have been made, chosen, elected, and appointed to be such supposed mayor as aforesaid, was not duly constituted, nor was the said Richard Bower, at the said time, when, &c. in the said plea in that behalf

mentioned, duly made, chosen, elected, or appointed to be mayor of the said borough and town. Demurrer and joinder.

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Chitty, in support of the demurrer :

The question is, whether the charter set out in the plea does or does not *require that a majority of each component part of the corporation should be present at the election of the mayor of this borough. The variation in the form of expression used in different parts of the charter, shews that it was not necessary for the majority of each component part to be present. The four burgesses or inhabitants of the borough, out of whom the mayor is to be selected, are to be nominated by the mayor and aldermen, or the greater part of them. That certainly requires the presence of the majority of the aldermen ; but then the charter proceeds to say, that “out of the four so to be named, the mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants, of the borough for the time being (they being congregated for that purpose) or the greater part of them as shall be so congregated, may and shall have full power, by the greater part of the voices of them so assembled, to choose one to be mayor.” That passage does not require that the election should be by the greater part of each of those bodies, but by the greater part “of them as shall be so congregated.” The introduction of the latter words distinguishes this case from all that are to be found in the books. It appears to have been the intention of the charter, that after a nomination by a select body, there should be a popular election of a mayor, in which the weight of each vote would be equalized ; and that would render it quite unimportant, whether or not a majority of the aldermen or principal burgesses attended to give their votes on that occasion. Besides, if the words “greater part of them,” in this part of the charter, are to be applied to any particular body, they must be applied to each component part of the corporation ; but the mayor being only one, they *cannot apply to him, nor can it be supposed that the majority of the inhabitants, who may amount to 5,000, are required to be present. The true construction is, that the mayor must be elected by a majority of those present, considering them as forming one mass ; and this

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agrees with the case of *Reg. v. Locke*,† where the Court said, “If an act to be done be referred to the constituent members of a corporation, nothing can be done but by a majority of those who are the constituent part of the corporation. But where a thing is referred to be done by the commonalty, there the majority of those who are present (all being summoned) will bind the rest.”

Adam, contra :

The election of the defendant was bad, inasmuch as a majority of the twenty-four principal burgesses did not attend. In *Rex v. Morris*,‡ the election of a mayor of this very corporation was held void, because a majority of the principal burgesses was not present; and that body being reduced to less than one half of its proper number, the corporation was thereby dissolved, not having power to make a legal assembly to fill up the vacancies. Under the new charter granted by the late King, the corporation consists of the same component parts as before; this case must, therefore, be governed by *Rex v. Morris*, unless the words “or greater part of them as shall be so congregated,” introduced into the new charter vary the mode of election. By the old charter the election of the mayor was to be determined by the greater part of the voices of them so assembled, and the words now added do not *at all change the sense of the passage. No doubt the election must be decided by the majority of the mass when assembled, but the corporate body can never be legally assembled, unless a majority of each definite part be present: *Rex v. Miller*, § *Rex v. Belringer*, || *Rex v. Varlo*. ††

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Chitty, in reply :

It is reasonable to suppose that, when the new charter was granted, some mode would be given for avoiding the difficulty which had been before experienced, and the words in question, which were not in the old charter granted by James I. appear to have been introduced with that view.

† Vin. Abr. Corp. (G 3.) pl. 8.

|| 4 T. B. 810.

‡ 4 East, 17.

†† 1 Cowp. 248.

§ 3 B. R. 172 (6 T. R. 268).

(ABBOTT, Ch. J. : Suppose the number of principal burgesses to be reduced one-half, could there be a good election under this charter ?)

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It would certainly be difficult to establish that there could.

ABBOTT, Ch. J. :

It has now been for many years an established principle in corporation law, that if an election is to be made by a definite body alone, or by a definite together with an indefinite body, a majority of the definite body must be present. In the latter case it is not, indeed, necessary that the party elected should have the voices of the majority of the definite body, but still they must form a part of the mass. Much good is derived from adhering to general rules ; and this rule, as to corporations, is in itself extremely beneficial, as it compels them to fill up, from time to time, the vacancies that occur. It should not, therefore, be broken in upon by nice and subtle construction. Now, the words *of the charter are, that “ the mayor and aldermen shall name four burgesses or inhabitants, and that the mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants (being for that purpose assembled and congregated together,) or the greater part of them as shall be so congregated, shall elect one of the four for mayor.” Upon this two things are to be considered : first, Who are to meet ? The mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants ; according to the general rule, the majority of the principal burgesses (that being a definite body) must meet. Secondly, Who may elect ? The majority of the mass. I cannot see any difference between “ the greater part of those so congregated,” and “ a majority of the voices of those so assembled.” There is nothing, then, in this charter to take the case out of the general rule, according to which, the election of the defendant was illegal, and judgment of ouster must be pronounced.

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BAYLEY, J. :

In *Rex v. Miller* it was established as a rule, that where

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any thing is to be done by a general assembly of a corporate body, a majority of each definite part of it must be present; and that rule has never been broken in upon. A case of this nature may be taken out of the general rule by the words of the charter. What then are the directions given by the charter in question? That the election shall be by the mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants for the time being (they being for that purpose assembled and congregated), or the greater part of them so congregated. *Rex v. Belringer* is decisive as to the meaning of the words "for the time *being," and the words "congregated and assembled" mean so assembled as the law requires, viz. by a majority of each definite body. The argument for the defendant is, that the words "greater part of them as shall be so assembled," narrow the meaning of the former passage, which requires a legal assembly, according to the general rule; but they have no such effect. The majority is to be of those so assembled, that is, assembled as by law is necessary. I am, therefore, of opinion that this is within the principle of *Rex v. Miller* and *Rex v. Morris*; and that if it had been intended by the present charter to alter the general rule of law as to corporation assemblies, more explicit words would have been used to manifest that intention.

HOLROYD and BEST, JJ. concurred.

Judgment of ouster.

REX *v.* THE BIRMINGHAM GAS-LIGHT AND COKE COMPANY.

1823.
April 23.
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(1 Barn. & Cress. 506—513; S. C. 2 Dowl. & Ry. 735.)

By an Act of Parliament the Birmingham Gas-light and Coke Company had power given to them to supply the town of B. with gas, and to lay down pipes for the conveyance of gas from the manufactory to the houses of the consumers. Under this Act the company purchased lands and buildings, and there placed retorts, &c. necessary for the manufacture of gas and coke, and fixed in the streets trunks, pipes, &c. for the conveyance of gas. The company derived a considerable profit from the manufacture and sale of coke and gas. The stock in trade, and the profits of other manufactories in the parish of B. were not rated to the poor: Held, that the company were not rateable to the amount of the profits of their trade, but for a sum equal in amount to that for which the premises would let to other persons willing to carry on the same business.

By a rate for the relief of the poor of the parish of Birmingham, in the county of Warwick, the Birmingham Gas-light and Coke Company were assessed in *respect of dwelling-houses, shops, buildings, land, and premises, and the trunks, pipes, and other apparatus, for the conveyance of gas belonging to the company, situate and being fixed in the ground, in the parish of Birmingham, and the profits therefrom within the parish; the annual value being stated at 800*l.* and the assessment 20*l.* Upon appeal against this rate, the Sessions confirmed the same, subject to the opinion of this Court on the following case:

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By a private Act of the 59 Geo. III., certain persons therein named, and their successors, were declared to be a body corporate, by the name of the Birmingham Gas-light and Coke Company, and powers were given them “to supply the town with gas, to enter into contracts for the lighting of houses, &c., and with the consent of the commissioners for lighting and paving the town, to break up the soil and pavements of the streets, &c., for the purpose of laying down pipes and other necessary apparatus, for the conveyance of gas from the manufactory to the houses, &c. of the consumers.” In pursuance of the provisions of this Act, the company purchased the dwelling-houses, shops, buildings, land and premises mentioned in the assessment, and erected and placed therein retorts,

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gasometers, purifiers, and other apparatus necessary for the manufacture of gas and coke (part of which apparatus is affixed to the freehold and part is not,) and also by the consent of the aforesaid commissioners, broke up the soil and pavements in the streets, and fixed therein the trunks, pipes, and other apparatus for the conveyance of gas, mentioned in the assessment, and which communicate with the house and manufactory. The company carry on a considerable manufacture of coke and gas upon these *premises, and derive a profit from the sale of each of those articles. The coke is conveyed from the premises of the company to those of the purchasers, by means of carts and waggons, and the gas by means of the trunks, pipes and other apparatus for the conveyance of gas, mentioned in the assessment; gas and coke are both manufactured from coal, at a great expense of fuel, and the machinery and apparatus necessary for the manufacture of these articles are also very expensive, and require frequent renewal. Stock in trade, and the profits of the manufactories in the parish of Birmingham, are not rated to the poor in this rate. The premises, trunks, pipes, &c. mentioned in the assessment as belonging to the company, if rated to the poor as other lands within the parish, that is to say, if the profits arising from the sale of gas are not included, are worth 200*l.* per annum; but are worth 800*l.*, if the profits arising from the sale of gas are included. If the Court of King's Bench should be of opinion that the profits accruing to the company from the sale of gas are not rateable, or that they can only be rated as the profits of a manufactory, the rate ought to be amended, by inserting the sum of 200*l.* therein, in lieu of the sum of 800*l.*, and the sum of 5*l.* in lieu of the sum of 20*l.*

Clarke, Gurney, Reader, and Holbech :

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The company are liable to be rated for these buildings, and the trunks and pipes, as the occupiers of the land on which their buildings are situate, and over which their pipes are distributed:
Rex v. The Corporation of Bath,† *Rex v. The Company of Proprietors of the Rochdale Waterworks.*‡ In the latter case

† 13 R. R. 333 (14 East, 609).

‡ 1 M. & S. 634.

the company were held to be rateable, as the occupiers of pipes conveying water. The only difference between that case and this, is, that the pipes here convey gas. In that case Lord ELLENBOROUGH says, that it made no difference whether it be a reservoir of so many feet square, or a pipe of so many inches in diameter. Here, the pipes may be considered as warehouses for gas. Secondly, the property is rightly assessed at 800*l.*, which is its value to the company, and the measure of their ability to pay. In *Rex v. Sir Archibald Macdonald*,† the trustees were assessed for the dues and rates of the Rochdale canal lock and tunnel, at 562*l.* 10*s.*; and the case found that the tonnage amounted to the sum charged in the assessment. The objection was, that the rate was for the tolls payable at the lock, under the Act of Parliament, and that tolls were not rateable: but the Court held the rate to be good, and Lord ELLENBOROUGH said, “The Court have only said, that tolls are not rateable *per se*, but only when connected and rated conjunctively with real and substantial property, situated in the parish, which, as yielding profit there by means of the toll, is the proper subject of rating within the statute of Elizabeth. Now here, the lock itself is rated, which is something real and substantial, locally situated within the township, and producing profit, and the addition of the dues or rates is merely giving other names for the same thing.” The dues constituted the entire profits which the trustees received from the lock; therefore they were rated for *the profits of the lock. Here the trunks and pipes are local

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Denman, contra, was stopped by the Court.

ABBOTT, Ch. J. :

The question proposed to us is not whether the company be rateable for their buildings above ground, or their pipes under

† 11 B. R. 396 (12 East, 324).

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ground, but to what amount they are rateable. I am of opinion, that the amount in respect of which they are rateable, is the sum for which the buildings, trunks, and pipes would let to a person who is willing to carry on the business there. It appears from the statement in the case, that the premises, trunks, and pipes, if rated to the poor as other lands in the parish, that is, if the profits arising from the sale of gas are not included, are worth 200*l.* per annum, but if the profits are included, then they are worth 800*l.* per annum. I am of opinion that the profits are not in this case rateable. If they were, a blacksmith's forge might be rated, not at what it would let for, but at the sum which the blacksmith acquires by it. The distinction between the cases cited and the present, is, that here the profits rated are those of a manufactory which are obtained by applying the skill and industry of man to capital brought from a distance for that purpose. They are very different from the profits of canals or of mineral waters, which are natural products arising within the parish, and rendering the land in which they are situate more *valuable. For these reasons I am of opinion that the rate must be amended by inserting 200*l.* as the value of the buildings and pipes, and 5*l.* as the sum to be paid.

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BAYLEY, J. :

This is really a question of quantum. In most of the cases cited, the question was, whether the property was rateable or not; and though the profits may have been referred to as fixing the quantum, the Court never went into that question. Here the question of quantum is presented to the Court, and a distinction is taken between the value of the land *per se*, and when it is used for the purposes of the trade. I am of opinion that the company ought to be assessed, not at a sum equal to the annual profits of their trade, but at that sum which the buildings, trunks, and pipes would produce to them if let at an annual rent to persons willing to carry on the trade, or that rent which the company would be forced to pay if the premises were not their own property.

HOLROYD, J. :

I am of opinion that the rate ought to be amended, as it is

stated that in this parish the profits of other manufactories are not rated. In the case of a canal, the land and the water are rated; and here an attempt is made to rate the pipes and the gas; but that cannot be done. The proper criterion for the rate to be imposed upon these lands and buildings is the rent at which they could be let to a person willing to carry on the business.

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BEST, J.:

I think that such a construction ought to be put upon the statute of Elizabeth as to include the largest *portion of productive property, because I feel that the poor rate, and various other burthens, press heavily upon the landed interest. This rate, however, cannot be supported: it is an assessment upon the profits of trade. Now that is not a correct mode of assessment. Land is usually rated not for the entire profits derived from it, but according to the rent which the tenant pays for it; and trade ought not to be rated according to its gross profits, but according to the value of the stock used in the trade. Besides, a rate even upon the net profits of any undertaking must be unjust and unequal, in a place where similar profits and stock in trade of others are not generally rated. The rate is in this case clearly on the profits of a trade and manufacture. The profits of this company are very different from the tolls of a canal. When a canal is once formed and filled with water, it produces to the proprietor, without any thing further being done, a permanent profit in the shape of tolls; but the Gas Company could obtain no profit by merely laying down these pipes for the conveyance of gas through the streets. The gas must afterwards be manufactured by the company at a great expense, and sent through those pipes before they will be entitled to any recompence. The gas company stand, therefore, in the same situation as any other manufacturer who produces by artificial means a saleable commodity. Now the profits of such a manufacture could not, with justice, be rated to the relief of the poor in a parish where other profits and other stock in trade are not rated. I think, therefore, that the company ought to be assessed at that annual sum for which the premises and pipes

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would let to a person willing to carry on the trade, and therefore, *that the rate ought to be amended by inserting the sum of 200*l.* instead of 800*l.*; and 5*l.* instead of 20*l.*

Rate amended accordingly.

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April 24.
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EARL OF BRISTOL v. WILSMORE AND PAGE.

(1 Barn. & Cress. 514—522; S. C. 2 Dowl. & Ry. 755; 1 L. J. K. B. 178.)

By a contract of sale the property sold was to be paid for by ready money. The purchaser induced the servant of the vendor to deliver it for a cheque upon a banker, by representing it to be as good as money; in fact he had overdrawn his account for many months, and when the cheque was presented, payment was refused. On the same day that the goods were purchased, the purchaser gave a warrant of attorney to a creditor, under which judgment was immediately entered up, and execution issued, and the property in question seized by the bailiff of a liberty. While it was in his custody, the original owner rescued it: Held, in an action brought against the latter by the bailiff of the liberty for the rescue, that the question whether the contract of sale was so vitiated by fraud as to prevent the property in the goods passing to the purchaser, depended upon a question of fact, which ought to have been submitted to the jury, namely, whether the purchaser had obtained possession of the goods with a *preconceived* design not to pay for them. †

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DECLARATION by the plaintiff, as chief steward of the liberty of Bury St. Edmunds, stated that Elizabeth Carver had recovered 400*l.* and costs against *Wm. Miller, by the judgment of the Court of King's Bench, and had sued out a *testatum fi. fa.*, directed to the sheriff of Suffolk, to levy the amount, who made out his mandate to the plaintiff, as steward of the liberty, to levy that sum; that the plaintiff, by virtue of the mandate took 100 sheep, which were then feeding in a field belonging to Miller: that while the sheep were in the custody of the plaintiff, the defendants wrongfully rescued them; by means whereof plaintiff was prevented from satisfying the debt and costs, and

† As shewn in Benjamin on Sale, 4th ed. p. 412 *et seq.*, this criterion is not borne out by modern cases. See in particular, *Kingsford v. Merry* (1856) 1 H. & N. 503, 26 L. J. Ex. 83. (reversing S. C. 11 Ex. 577, 25 L. J. Ex. 166.) But in such a case as the

above the question remains whether the intention of the vendor as to the transference of property and possession under the ready money bargain was not conditional within the principle of *Bishop v. Shillito*, 20 R. R. 457 n. (2 B. & Ald. 330 n.)—R. C.

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Elizabeth Carver commenced an action against him to obtain payment, and plaintiff was obliged to expend 100*l.* in compromising that action. There was also a count in trover. Plea, not guilty. At the trial, before Abbott, Ch. J., at the Middlesex sittings after last Trinity Term, it was proved, on the part of the plaintiff, that the sheep were taken in execution by an officer of the plaintiff, under a mandate of the sheriff of Suffolk, as stated in the declaration. In the course of the night after they were seized in execution, and while they were in the custody of the officer, in a field belonging to Miller, next adjoining to a meadow belonging to the defendant Wilsmore, Page made a passage for the sheep into Wilsmore's field. The latter impounded them, and the next morning delivered them to Page, upon his paying the alleged amount of the damage done. This appeared to have been a contrivance between Wilsmore and Page, in order to enable the latter to obtain possession of the sheep. On the part of the defendant it was proved, that Miller had obtained the sheep from Page under the following circumstances. They were offered to him for sale on Wednesday the 16th May, 1821, by Lemon, the servant of Page, and Miller agreed to pay 78*l.* in ready money for them. *The bargain being made, the sheep were driven by Lemon to the house of Miller, at Nayland, about nine miles from Colchester. Upon their arrival there, Miller prevailed upon Lemon to accept a cheque for 78*l.* upon Mills & Co., bankers at Colchester, by assuring him that it was as good as money. Miller's account at the banker's had been overdrawn for some months before this transaction took place. Lemon then left the sheep in Miller's possession. Page, after keeping the cheque for two days, presented it at the banker's, and payment was refused. On the very day the sheep were obtained from Lemon, Elizabeth Carver, who was sister-in-law to Miller, went with him to the office of an attorney at Colchester, who was an entire stranger to them, and gave him instructions to prepare a warrant of attorney, which was done accordingly; and, upon that, judgment was entered up and execution issued against Miller, under which the sheep in question were taken. Miller absconded, and was not afterwards heard of. Upon these facts it was contended, on the part of the defendant, that no

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property in the sheep was vested in Miller by the sale, he having obtained possession of them by fraud. On the part of the plaintiff it was contended, that the property did pass, inasmuch as there was no false representation made to induce Page to part with the possession of the sheep; and the case of *Rex v. Lara* was cited. † The LORD CHIEF JUSTICE, upon the authority of that case, was of opinion, that the property had passed to Miller; and the plaintiff, accordingly, had a verdict for 78*l*. A rule *nisi* for a new trial having been obtained in last Michaelmas Term,

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Scarlet and Chitty now shewed cause :

By the contract and subsequent delivery, the property in the sheep vested in Miller. In the case of a sale upon credit the property vests in the vendee by virtue of the contract. But where the sale is for ready money, it vests in the vendee by delivery. Supposing the servant to have exceeded his authority by receiving the cheque instead of ready money; yet, if the master adopted the act of his servant, he must be bound by it. Here he did adopt it, for he kept the cheque from Wednesday until Saturday. He, therefore, consented to the vendee's having possession of the property sold. If the bankers had failed on the Friday, and the vendee had had money in their hands, it is clear that the cheque would have been a good payment. The master must be taken, therefore, to have given credit to Miller from the time he received the cheque from Lemon. If he did not mean to adopt the act of his servant, he should have returned the cheque immediately; whereas he kept it for two days before it was presented. At all events, after the lapse of so much time, and after the rights of third persons have intervened, Page ought not to be allowed to say that the property never vested in Miller, into whose possession the sheep were delivered.

Marryat and Walford, *contra* :

Miller obtained these goods with a pre-conceived design not to pay the price, and to place them in the hands of a particular

† 6 T. R. 565 [overruled *R. v. Jackson* (1813) 14 R. R. 756; 3 Camp. 370—R.C.]

creditor; and in order to execute his plan, he represented a draft, which he knew to be worth nothing, to be as good as money. He might, therefore, have been indicted under the 30 Geo. II. c. 24 †, for obtaining goods by false pretences. *In *Rex v. Lara* ‡ the indictment charged an offence at common law, and it was held to be bad, because it did not charge the defendant with having used any false token to accomplish the deceit. In *Rex v. Jackson* § however, it was held to be an indictable offence, under the 30 Geo. II. c. 24, fraudulently to obtain goods by giving a cheque upon a banker, with whom the party kept no cash, and which he knew would not be paid; and BAYLEY, J., who decided that case, stated, that the point had been then recently before the Judges, and that they were all of opinion that it was an indictable offence. The case alluded to was probably that of *Rex v. Freeth* ||, where it was held, upon an indictment under the same statute, that the fact of uttering a counterfeit note as a genuine note was tantamount to a representation that it was so. These are authorities to shew, that Miller, in this case, might have been indicted for obtaining the sheep by fraud; for he not only uttered, as an available security, that which he knew to be of no value, but he actually represented it to be as good as money. This is, therefore, a much stronger case than either *Rex v. Jackson* or *Rex v. Freeth*. In *Noble v. Adams* †† the plaintiff brought trover for goods against a wharfinger, into whose hands they had come by his order, upon their arrival from Glasgow. The plaintiff had purchased them there from Cross & Co. One of the questions was, whether the property had passed from Cross & Co. to the plaintiff, or whether they had been obtained under such circumstances of fraud as vitiated the sale. The plaintiff was a trader in London, *and being the holder of a bill accepted by Outhwaite, with whom he was in the habit of exchanging bills, and whom he knew to have become insolvent, and knowing himself to be in embarrassed circumstances, wrote to Malcolm, a creditor in Glasgow, stating, that Outhwaite & Co. could not pay their bills, and were not worth a

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† See now 24 & 25 Vict. c. 96,
s. 88—R. C.

‡ 6 T. R. 565.

§ 14 R. R. 756 (3 Camp. 370).

|| 2 Russell on Crimes, 1392.

†† 17 R. R. 445 (7 Taunt. 59;

2 Marsh. 366; Holt, N.P. 248).

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farthing, and that it was necessary for him to go down into Scotland and purchase goods, by which means he could stand, and help out one or two of his creditors. He went to Glasgow, and there purchased the goods in question of Cross, for which he paid by Outhwaite's acceptance, and by another bill which Malcolm was prevailed on to draw on the plaintiff, in favour of Cross & Co. He did not, however, assist either of his creditors. GIBBS, Ch. J. thought it was a question for the jury, whether Cross & Co. had merely made an improvident sale, or whether the defendant had proved that the plaintiff had fraudulently obtained the goods. If they thought that the plaintiff went down to Scotland, having formed a deliberate plan to put off bad bills for valuable merchandizes, knowing the goods would never be paid for, and intending then to abscond with the goods, or to throw them into an immediate bankruptcy, or to pass them over to a particularly favoured creditor, he was of opinion that the plaintiff was guilty of a fraud, and that the sale would not change the property; but if the plaintiff only meant to give these bills, and himself, by these bills, more credit than they deserved, and intended to carry on his business, and to try to pay for the goods at some time or other if he could, that was not such a fraud as would vitiate the sale. The jury found that this was a fraudulent transaction undertaken knowingly, and with intent to defraud Cross & Co. of their goods. Afterwards upon motion the Court would *have granted a new trial upon certain terms, upon the ground that it did not sufficiently appear upon the evidence, whether the means which the plaintiff used to obtain possession of the goods, were such as to fix him with the offence of obtaining goods by false pretences. Yet all the Court agreed, that under the guards with which the LORD CHIEF JUSTICE had stated the proposition to the jury, he had stated it correctly. Now, according to the authorities already cited, the fact of uttering as an available security, Outhwaite's bill, which the plaintiff knew to be of no value, would be tantamount to a representation that it was good. But at all events, the decision of the Court of Common Pleas is an authority to shew, that if Noble had been guilty of an offence within the statute, the sale would be thereby vitiated. In this case Miller was guilty of

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such an offence, for having contracted to pay for the sheep in ready money, he represented his cheque to be as good as money, and thereby induced the vendor to part with the possession. The case, therefore, ought to have been left to the jury to say, whether Miller had obtained the sheep with the preconceived design of never paying for them. In *Read v. Hutchinson*,† which was an action for goods sold, it appeared by the broker's note, that 47 pipes of wine were sold by the plaintiff to the defendant for a particular specified bill, without recourse to the buyer, if dishonoured. The plaintiff's case was, that the bill was dishonoured, and that the defendant at the time of the sale, perfectly well knew it was worth nothing, and had represented it as an available security. Lord ELLENBOROUGH held, that *indebitatus assumpsit* would not lie, because this was only a contract of *barter, and he is reported to have said further, "if the contract is rescinded there is no sale. The defendant is not a purchaser of the goods, but a person who has tortiously got possession of them. If he knew at the time the bill was worth nothing, I think he is answerable to the plaintiff to the amount of the value of the goods; but this is not the proper remedy. The plaintiff should have brought trover, or an action of deceit." That case shews it to have been the opinion of Lord ELLENBOROUGH, that if, at the time when a contract of sale is made, a party, by representing as an available security a bill which he knew to be worth nothing, obtains possession of the goods, he does not thereby acquire any property in them.

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ABBOTT, Ch. J. :

Upon further consideration we are all of opinion that there ought to be a new trial. If Miller contracted for and obtained possession of the sheep in question with a preconceived design of not paying for them, that would be such a fraud as would vitiate the sale, and according to the cases which have been cited, would prevent the property from passing to him. Whether he obtained possession of the goods with such a preconceived design, is a question of fact which ought to be left to the jury, and for

† 3 Camp. 352.

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that purpose the case must go down to a second trial. At the former trial, the cases of *Noble v. Adams*, *Rex v. Jackson*, and *Read v. Hutchinson* were not cited. If the property in the sheep had not passed to Miller, it is clear that the plaintiff was not entitled to the possession of them, against the defendants. For the plaintiff had a right to seize, under the *fieri facias*, *the property of Miller only. Unless the sheep, therefore, had become the property of Miller the plaintiff had no right to take them, and still less to retain possession of them as against the rightful owner.

Rule absolute.

1823.
April 25.

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DOE DEM. SIR EVAN NEPEAN, BART.,
v. I. GODDARD.

(1 Barn. & Cress. 522—531; S.C. 2 Dowl. & Ry. 773; 1 L. J. K. B. 179.)

In the manor of A. there is a custom that, when a copyhold tenement is granted by copy of court roll to any person to hold the same to *such person* for the lives of two or more other persons, and the life of the longest liver of such other persons *successively*, and the grantee dies during the life or lives of any one or more of such other persons, without having devised the said copyhold tenement, such other person or persons shall be entitled, by virtue of such grant, to take and hold the copyhold tenement *successively*, as they are respectively named in the grant, during his or their life or lives respectively; but if the grantee devises the copyhold tenement, the devisee shall take and hold it during the life or lives of the *cestui que vies*: Held, that this was a good custom.

EJECTMENT to recover the possession of a copyhold tenement situate in the manor of Loders and Bothenhampton, in the county of Dorset. At the trial before Park, J., at the Spring Assizes, 1822, for that county, a verdict was found for the plaintiff subject to the opinion of the Court upon the following case.

The premises in question were a copyhold tenement within and parcel of the manor of Loders and Bothenhampton, and demiseable by copy of court roll of the said manor. At a court leet and court baron of Robert Gummer, then lord of the said manor, there held on the 14th day of October, 1788, before John Symes, steward, came Samuel Goddard, who claimed to hold

by copy of court roll of the said manor, dated the 12th day of June, 1787, for the lives of Henry Davie, and Henry Davie the younger, his son, one customary messuage or tenement *with the appurtenances, in Bothenhampton, in the said manor, containing eight acres; and, according to the custom of the said manor, surrendered into the hands of the lord all the said premises, together with the said copy of court roll, to be cancelled, that the lord might regrant the same in manner hereinafter mentioned. Whereupon, at the said Court, came the said Samuel Goddard, and retook of the lord, by the delivery of his said steward, the said premises, to hold the same, with the appurtenances to the said Samuel Goddard, for the lives of John Goddard and Daniel Goddard his sons, and the life of the longest liver of them *successively*, at the will of the lord, according to the custom of the said manor, by the yearly rent of seven shillings and an heriot, according to the custom of the said manor, when it should happen, and by all other burthens, works, customs, suits, and services, therefore due and of right accustomed. And for such estate and entry in the said premises so to be had, the said S. Goddard, as sole purchaser, gave to the lord a fine of 21*l.*, and so the said S. Goddard was admitted tenant thereof, and did his fealty. There is a custom in the manor, that when a copyhold tenement within the same is granted by copy of court roll to any person, to hold the same to such person for the lives of two or more other persons, and the life of the longest liver of such other persons *successively*, at the will of the lord, according to the custom of the said manor, and the grantee dies during the life or lives of any one or more of such other person or persons, without having devised the said copyhold tenement by his last will and testament, such one or more of such other person or persons so surviving such grantee, shall be entitled, by virtue *of such grant, to take and hold such copyhold tenement *successively*, as they are respectively named in such grant, during his, or their life or lives respectively, at the will of the lord, according to the custom of the said manor. But if the grantee devise such copyhold tenement by his last will and testament in writing, then upon his death the devisee shall be entitled to take and hold the same during the life or

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lives of such other person or persons so surviving as aforesaid. On the 2nd October, 1820, the said S. Goddard died, having, by his last will and testament in writing, devised the said copyhold tenement unto the defendant, (who is the first of the lives mentioned in the grant of the said copyhold tenement,) his heirs and assigns: and the defendant thereupon entered into the said copyhold tenement, and by himself, or his under-tenants, ever since has been, and still is, in possession thereof. At the Court held on the 5th April, 1821, the defendant personally appeared and claimed to be admitted, but the steward of the manor refused to admit him. Sir Evan Nepean, the lessor of the plaintiff, at the time of the death of S. Goddard, was, and ever since hath been, and still is, lord of the manor and seised in fee thereof. The defendant entered into the common rule, and thereby confessed lease, entry, ouster, and possession. The demise in the declaration was after the death of S. Goddard. The questions for the opinion of the Court are, whether the said custom is good in law, and whether under, and by virtue of such grant and custom, the defendant is legally entitled to hold the said copyhold tenement as against the lessor of the plaintiff, and his lessee, the plaintiff in the present ejectment. The case was now argued by

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Banckes, for the plaintiff:

It appears by the case, that the defendant was only introduced into the habendum of the grant to S. Goddard as cestui que vie. It is therefore clear, that without the aid of a custom he would take no interest under that grant. If then the custom proved, coupled with the grant, be bad in law, or if the grant be inconsistent with the custom, the plaintiff is entitled to recover. Custom may construe and explain grants, but can never insert words in them, particularly the name of a grantee. Thus a custom, that a copyholder for life shall have power to surrender to another for the life of that other, is bad: *Watk. on Copyholds*,† *Anon. Moore's Rep.*‡ So a grant to a man, "sibi et assignatis suis," may by custom mean "to him and his heirs:" *Bunting's case*:§ but "sibi" alone can never by any custom

† Vol. 1, p. 98.

‡ 8, pl. 27.

§ 4 Co. Rep. 29.

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convey an estate of inheritance. There is nothing doubtful or ambiguous in the words of this grant, so that there is nothing upon which the custom can fasten. This is not a claim of regrant, as in *The Duke of Somerset v. France*,† but the question is, whether a grant to S. Goddard shall effect something, which is not even implied in it.

(HOLROYD, J.: If the estate had been freehold, the grantor would by this grant have parted with it until the two lives were expired, and at common law there would have been a general occupancy. In copyholds there is no general occupancy, because, at the death of the grantee, the lord has a right to re-enter, but it does not follow that a custom substituting a successor may not be good.)

If copyhold estates were the subject of general occupancy, a custom might point out *a special occupant, but, upon the death of tenant *pur auter vie*, the right is in the lord, and cannot be taken out of him without express words for that purpose. The question is not so much, whether such a custom may exist, but whether it can exist coupled with such a grant as this. In *Smartle v. Penhallow*,‡ the habendum was to the grantee and “his assigns;” that case is, therefore, distinguishable from the present. The case put by Lord ELLENBOROUGH, Ch. J. in *Right v. Bawden*§ is also distinguishable, for there the cestui que vies were admitted tenants in reversion.

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(BAYLEY, J.: The word “successively” in this grant may have some operation.)

That word was probably introduced to shew that S. Goddard was to hold for the life of the longest liver of the cestui que vies, and not for their joint lives only. It has been said, that by custom a copyholder for life may name his successor, but a doubt as to that is expressed in Gilbert’s Tenures.|| Now this

† 1 Str. 654.

‡ 2 Ld. Raym. 994.

§ 3 East, 260.

|| 323; but see a note on that passage in the 4th edit. by Watkins.

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custom would do more, for it would take the interest out of the lord without any grant. Such a custom would be against common right, and all such customs are bad: † *Stevens v. Tyrrell*.‡ The converse of this custom certainly would not be good, viz., that the grantee should hold on for his own life after the death of the cestui que vies: *Anon.*§ There is another objection to this custom; that it is uncertain, for the cestui que vies are to take only in the event of the grantee dying without devising the estate. Now, a custom that depends upon the will of another is void: Com. Dig. Copyhold.¶ The *grantee may also defeat the cestui que vies by surrendering. If it be said that he cannot so defeat them, it may be questionable whether Davie the cestui que vie in the former grant to S. Goddard has not a better right to the estate than the present defendant. But a custom to prevent tenant *pur auter vie* from surrendering would be unreasonable, and therefore void. Lastly, the grant is inconsistent with the custom. The words "sole purchaser," introduced into the grant, shew that the interest was purchased for S. Goddard alone, and no one else can take an estate in remainder by virtue of that grant.

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C. F. Williams, contra, was stopped by the Court.

ABBOTT, Ch. J. :

I am clearly of opinion that the custom stated in this case is good. By a grant to A. for the lives of B. and C., the grantor professes to part with the estate for those two lives. By the common law, upon the death of the tenant *pur auter vie*, under such a grant of a freehold, there would be a general occupancy. The question, then, is, whether a custom may not extend to copyholds the rule established by the common law as to freeholds, and give the estate to the cestui que vies for the residue of the time mentioned in the grant, in the event of the grantee dying without having disposed of it by will. I cannot discover any thing unreasonable in such a custom. But it has been argued that the grant to S. Goddard for the life of the defen-

† Com. Dig. Copyh. (s. 10).

‡ 2 Wils. 1.

§ Moore, 8, pl. 27.

¶ S. 19.

dant is not good, because Davie, who was before a cestui que vie, had an interest in the estate, which could not be surrendered. That argument, however, is inapplicable; for that estate was surrendered during the life of S. Goddard, *and the custom would not begin to operate until his death; it could, therefore, only attach upon that estate which he had at his death, and not upon that which was previously surrendered. Another argument has been founded on the words “as sole purchaser.” But I take them to mean nothing more than that S. Goddard alone paid the fine, so that no other person could, by paying part, have an equitable interest in the estate. The word “successively” in this grant, is not, as it appears to me, an idle word. It is applicable to a holding by several, one after another, and would be unnecessary, and indeed unintelligible, if applied to S. Goddard alone. For these reasons I think that the custom is good *per se*, and that there is nothing in the terms of the grant to make it otherwise. The defendant is, therefore, entitled to the estate, and must have a verdict entered in his favour.

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BAYLEY, J.:

If that part of the argument were sustainable, in which it has been attempted to shew that the grantee could not surrender during his life, I should think the custom unreasonable, and therefore void. But the meaning of the custom, as stated, plainly is, that if the grantee shall not, by surrender during his life, or by will dispose of the estate, then the cestui que vies shall take it; and the word “successively” shews how they are to take. It is clear, that if a copyhold be given to A. and his heirs during the life of B., the heir of A. will be a special occupant. But there is no general occupancy of copyholds. Of freeholds there is, by the common law, a general occupancy; and the question is, whether by custom that may not extend to copyholds, and whether the same custom may not point out who shall be occupants. In *the case of *Smartle v. Penhallow*,†

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† 2 Ld. Raym. 994.

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took as special occupants; but that word makes no difference, for they took because no assignment had been made; so that the case must be considered as if the word "assigns" had never been introduced. In *Right v. Bawden*† the words "heirs and assigns" were not in the grant; in that respect it was similar to the present case. But there no custom existed, and both Lord ELLENBOROUGH and LAWRENCE, J. expressed an opinion that, had there been a custom, the cestui que vies would have taken. The word "successively," in this grant, shews the lord's concurrence that the cestui que vies should have the estate after the death of S. Goddard. That word is clearly introduced with a view to a succession to the estate, which could not be if it were to revert to the lord at the death of the tenant *pur auter vie*.

HOLBOYD, J.:

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I am of opinion that the custom in question is good and valid in law. The argument as to the power of surrendering is not substantial. The meaning of the custom is, that if the grantee dies while he is grantee, without devising the estate, then the cestui que vies shall take. Now, if he surrendered, he would no longer be in the situation of grantee; and, therefore, the case in which the custom is to operate in favour of the cestui que vie would not arise. The only ground on which it can be urged that this custom is bad, is, that it is unreasonable; but that cannot be unreasonable which merely effects in copyholds what the common law has established as to freeholds. In the case of a freehold, if the lord granted it for lives, he had nothing left in him *during that time; and, therefore, at common law, after the death of the grantee, a general occupant might enter; but the case of copyholds is different. For, notwithstanding the grant of a copyhold interest, the freehold in the land remains in the lord; and, in respect of that, he may enter, and not in respect of any copyhold interest reverting to him from the grantee. The custom here is merely, that, where the copyhold is granted to one for the lives of others, the same rule shall apply to that

† 3 East, 260.

as to freeholds ; and if the custom may establish an occupancy, no doubt it may also point out who shall be occupants.

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BEST, J. :

Under this custom the copyholder would no doubt pay for an estate to endure for two lives ; it would, therefore, be hard that the lord should take it back again at the expiration of one. A custom to prevent that cannot be unreasonable, particularly as it merely assimilates copyholds to freeholds, as regulated by the common law. It has been argued that the custom is inconsistent with the grant, but that is not so. The grant was to S. Goddard for the lives of two other persons ; it is therefore clear, that although the interest appears to be given to S. Goddard alone, yet the thing granted was not to revert to the lord until after the expiration of the two lives. A custom to dispose of the estate in the mean time is not inconsistent with the grant, but supplies a defect in it. The cases of *Smartle v. Penhallow* and *Right v. Bawden* are decisive. The former is not in principle distinguishable from the present, and in the latter, the Court put this very case as one in which the cestui que vies would take the estate. It has also been urged that the custom is void for uncertainty. If it be uncertain, the common *law also is uncertain ; for that gives the estate to the heir only in the event of the ancestor not otherwise disposing of it ; and this custom gives the estate to the cestui que vie, if the tenant *pur auter vie* does not devise it away. The objections taken to the custom are therefore invalid, and the defendant is entitled to the estate.

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Postea to the defendant.

1823.

REX v. SUSANNAH PALMER.†

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(1 Barn. & Cress. 546—550; S. C. 2 Dowl. & Ry. 793.)

The proprietors of an inland navigation are rateable to the relief of the poor in every parish through which the navigation passes, as occupiers of the land situate in each parish, used for the purpose of the navigation; and, therefore, where the proprietors of such a navigation, which extended through different parishes, were rated in one for the entire amount of their tolls, this Court held that the rate could not be supported.

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By a rate or assessment made by the overseers, churchwardens, and others, of the parish of Fornham All Saints, for the relief of the poor, Susannah Palmer was charged in the sum of 1*l.* 0*s.* 10*d.* for a wharf and buildings situate in Fornham All Saints, adjoining *the river Lark, and occupied and used for the purposes of navigation of the said river, and the towing paths, locks, sluices, and other works within the parish of Fornham All Saints, also occupied and used for that purpose, and the tolls arising therefrom due at Fornham All Saints rated at 250*l.* Upon appeal the Sessions confirmed the rate, subject to the opinion of this Court on the following case.

By an Act 11 & 12 Will. III. c. 22, s. 1, H. Ashley, Esqr., his heirs and assigns, were empowered to make navigable the river Lark, alias Burn, from a place called Long Common, a little below Mildenhall mill, to Bury Saint Edmunds; and after making satisfaction to the land owner, Ashley was to have and enjoy the cuts, water-courses, towing paths, &c. in as ample and beneficial a manner as if the same by good title and sufficient conveyance in the law had been absolutely sold and conveyed to him, his heirs and assigns. By another section Ashley, his heirs and assigns, were empowered to demand and receive for the freight of goods up the river from Mildenhall mill to Bury, or down the river from Bury to Mildenhall mill, at such place adjoining the river as he, his heirs or assigns should think fit, certain tolls or rates therein mentioned, and a proportionate rate or toll for any less distance. Mr. Ashley, the original undertaker, from whom the defendant derives her title, made the river navigable from

† As to the earlier cases referred to in this report, see note 4 R. R. 683, and Pref. p. vii.—R. C.

Mildenhall to Fornham All Saints, a distance of twelve miles and a-half. But it was never made navigable as far as Bury, nor beyond Fornham All Saints and Fornham Saint Martin. Half the channel (to the centre thereof) being in the former, and half in the latter parish, but the towing path and the half of one sluice and two locks are in *Fornham All Saints, the remaining half of the same sluice and locks being in Fornham Saint Martin. The towing path is separated from the adjoining lands by a ditch. The appellant is not an inhabitant of Fornham All Saints, but resides in Bury. She is the owner under a distinct title of a wharf or coal-yard, of about four acres, lying in the former parish, and adjoining to and situate at the extremity of the navigation, in which said wharf are several warehouses and other buildings; different portions of this wharf or coal-yard are from time to time allotted by the agent of the appellant to the principal coal merchants who use this navigation, to the number of fourteen or fifteen. They pay no rent for these portions, but keep the division fences of their respective portions in repair. These different portions are varied from time to time by the agent of the appellant. Large quantities of coals are carted at once from the boats, and not deposited in the coal-yard; but it is necessary for the accommodation of the wholesale dealers using the navigation, that they should have a place whereon to deposit their goods, but the appellant is not bound to provide such place. The buildings and the outerfences and walls inclosing the wharf and the towing paths, locks, and sluices, are repaired by the appellant, and were erected by her or her ancestors. Up to the year 1816, the appellant was rated on a rental of 17*l.* for the coal-yard, and no rate was imposed upon the profits of the navigation. The annual value of the coal-yard as mere land, is not above 3*l.* Since the year 1816, to the making of the assessment appealed against, she has been rated in the parish of Fornham All Saints, "for tolls arising from the navigation and warehouses," at 250*l.* per annum. The tolls becoming due, and received by the appellant for *goods landed in the parish of Fornham All Saints, equal the amount of the assessment.

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Denman and *Tindal*, in support of the rate, relied upon the

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cases *Rex v. The Aire and Calder Navigation*,† *Rex v. Page*,‡ *Rex v. The Proprietors of the Staffordshire and Worcestershire Canal*,§ as authorities to shew that tolls of a navigation were rateable in the parish where they become due. It is true that in the late case of *Rex v. Milton*,|| where a river navigation extended through several parishes, and certain tonnage dues became payable, in respect of goods carried along the line of navigation, and landed at a wharf locally situate within one parish, this Court held that a rate on the proprietor of those dues, for their whole amount, in that parish, stated to be for river tonnage, could not be considered as a rate upon that part of the river locally situate within that parish, but as a rate upon the parts of the river situate as well within as without the parish; and that it could not, therefore, be supported. That case is not distinguishable in principle from the present; but it is at variance with all the early authorities, which fully establish the position, that the tolls of a navigation are rateable in the parish where they become due.

ABBOTT, Ch. J. :

I entertain the greatest reverence for the opinion of the learned Judges who decided those cases. It must be recollected, however, that when those cases came before the Court, it had [*550] not been decided *that tolls *per se* were not rateable. That is now fully established by the case of *Rex v. Nicholson*.¶ The proprietors of a navigation are, therefore, rateable only as the occupiers of the canal, or land covered with water, for their tolls, as profits arising out of that land so used. They are rateable, therefore, in every parish through which the canal passes, in respect of the land there situate, and so used for the canal. The true principle of rateability is this: the land is to be rated to the relief of the poor in the parish where it is productive of profit to the proprietor, and in proportion to that profit, which may be considered as in the nature of a rent received by the proprietor for the use of his land within the parish. This is

+ 1 R. R. 579 (2 T. R. 660).

‡ 2 B. R. 454 (4 T. R. 543).

§ 4 R. R. 683 (8 T. R. 340).

|| 22 R. R. 317 (3 B. & A. 112).

¶ 11 R. R. 398 (12 East, 330).

very different from the case of a sluice. In that case the tolls become due for the use of the sluice itself, and the proprietor must contribute to the relief of the poor in that parish where the sluice is situate. The proprietor of a navigation is to contribute in respect of the profits of land, extending probably through many parishes; and he is to pay to each of those parishes in respect of his land locally situate within it. Here, the whole land occupied by the canal contributes to produce the entire amount of the tolls, and the proprietor of the navigation ought not to have been assessed at that amount in any one of the parishes through which the canal passes. The rate, therefore, cannot be supported, and the order of Sessions must be quashed.

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Order of Sessions quashed.

REX v. THE EARL OF PORTMORE AND ANOTHER.

(1 Barn. & Cress. 551—553; S. C. 2 Dowl. & Ry. 798.)

1823.
April 26.
[551]

The proprietors of a navigation extending through several parishes are to be rated in an intermediate parish, not in respect of the riverage becoming due in that parish for goods landed there, but in respect of the profits of the land used for the navigation situate within the parish.

DEFENDANTS were rated, as proprietors of the river Wey, at 32*l.* 10*s.*, being at the rate of 2*s.* in the pound upon the supposed amount of the tolls earned within the parish. By an Act of 22 & 23 Car. II., “for settling and preserving the navigation of the river Wey, in the county of Surrey,” the soil of the river and of the banks, &c., and the locks, &c., were vested in certain persons in the said Act specified, to be used and navigated by them only, their heirs and assigns, and their agents and servants, and not by any other person or persons, boat or boats, barge or vessel whatsoever, without their leave and licence. The defendants are the present proprietors of the said river and navigation, and liable as such to be rated in respect thereof. They are not themselves carriers upon the said river, nor the owners of any vessels navigated thereon; but every vessel navigated thereon is so navigated by their leave and licence, which is

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uniformly granted, subject to the provisions of certain rules made in pursuance of the Act of Parliament. By these rules the persons licensed to navigate any vessel upon the river, are required to pay to the receivers appointed by the proprietors of the navigation, a certain riverage for every ton of goods navigated on the same. The navigation extends from Guildford in Surrey to the river Thames, through several parishes, and among others the parish of Woking, and many tons of goods annually pass through that parish, to and fro, in vessels using the navigation to different places of destination ; *but the goods annually landed within the parish do not yield riverage to the amount in respect of which the defendants are assessed. The question for the opinion of the Court was, whether the proprietors of the navigation were rateable, except upon the amount of the riverage arising from the goods landed within the parish. If they were not rateable beyond that amount, then the rate is to be amended, by reducing it to —*l.* ; otherwise to stand at its present amount.

Monro, against the order of Sessions, being called upon by the Court, stated that he was prepared to have argued that the proprietors ought to have been assessed only in respect of the amount of the riverage arising from goods landed within this parish, on the ground that they could only be rated for their tolls at the places where they became due ; and he referred to the opinion of Lord ELLENBOROUGH in *Rex v. Sculcoates*,† and the other authorities cited [p. 504 *ante*] in *Rex v. Palmer*. He admitted, however, that, according to the principle laid down in the preceding case, the proprietors were liable to be rated in Woking in respect of the profits of their land, situate within that parish ; and if so, that the riverage payable on goods landed there would not be the correct measure of those profits.

Marryat, *Cowley*, and *Mangles* were to have argued in support of the rate.

Order of Sessions confirmed.‡

† 12 East, 40, 45.

‡ The ground on which all the earlier cases respecting the rateability

of canal tolls proceed is this, that the rate is laid upon the tolls themselves ; that they cannot be rated

NOVELLO *v.* TOOGOOD.†

(1 Barn. & Cress. 554—564; S. C. 2 Dowl. & Ry. 833; 1 L. J. K. B. 181.)

1823.
April 29.
[554]

Where the servant of an ambassador did not reside in his master's house, but rented and lived in another, part of which he let in lodgings: Held, that his goods in that house, not being necessary for the convenience of the ambassador, were liable to be distrained for poor rates.

TRESPASS for breaking and entering the plaintiff's house, and distraining his goods. Plea, not guilty. At the trial before Abbott, Ch. J. at the Middlesex sittings after last Easter Term, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case:

The plaintiff, who was a British-born subject, from the 5th of January to the 5th of July, 1821, rented and occupied a house in the parish of St. James, Westminster, and let part thereof in lodgings. The plaintiff continued in the occupation of the house on the 13th day of September, 1821. The defendant was collector of the poor-rate for the parish at the time of issuing the warrant, and making the distress hereinafter mentioned. The defendant being such collector, on the 13th day of September, 1821, entered the plaintiff's house and distrained his goods, under a warrant,

till they have an actual existence, or, in other words, till they are actually earned; and that they are not earned till the voyage is completed in respect of which they are payable. When *once it was decided that the tolls themselves were not the subject of the rate, the whole of this reasoning became inapplicable; and the only question was, whether the land out of which the tolls arose was rateable; and no reason has ever been assigned for the contrary, except the difficulty of imposing a just assessment. (See 2 R. R. 454, 455 (4 T. R. 26, 547), and 4 R. R. 683 (8 T. R. 349).) There seems indeed no satisfactory reason for holding that land which, by being applied to a particular purpose, produces a greater profit than it would have done if employed in

the ordinary manner, should not be rateable in respect of such profit, whilst a house is rateable for the additional value arising from the circumstance of its containing a billiard table or a machine. *Rex v. St. Nicholas, Gloucester*, Cald. 262, *Rex v. Hogg*, ib. 266; or from certain privileges attached to it, as that of selling liquor therein: *Rex v. Bradford*, 4 M. & S. 317, which are profits at least as extrinsic of the house as the tolls are of the land.

[See now also 6 & 7 Will. IV. c. 96.—R. C.]

† Cited and explained by WILLS, J., in *Parkinson v. Potter* (1885) 16 Q. B. D. 152, 161; 55 L. J. Q. B. 153, 156.—R. C.

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regularly signed and sealed by two magistrates. The rate on which the distress was founded was duly made, allowed, and published. The sum distrained for was due, in respect of the said house, for half a year, from the 5th of January to the 5th of July, 1821, and the same was regularly demanded from the plaintiff, and payment refused before the distress was made. The plaintiff, for the last twenty-five years, had been in the service of the ambassador from the crown of Portugal (to his late Majesty King George the Third, and his present Majesty King George the Fourth,) as first chorister in the chapel *of his Excellency in South Audley Street, which is attached to the house of the ambassador, and as such, had received a salary from the ambassador, payable quarterly, but the plaintiff did not live in the ambassador's house. During all that time he had officiated as such chorister in the said chapel twice on all Sundays and saints' days, and fast days, except on Wednesdays in Lent, when he had officiated only once, the service being performed only once a day. The Portuguese ambassador professes the Roman Catholic religion, and, according to the ritual of that religion, it is necessary to the due celebration of divine service, that there should be a person to officiate as the plaintiff did during the time in question. The plaintiff was registered with the secretary of state as chorister to his Excellency M. De Souza, the late minister of the King of Portugal, and the said M. De Souza was received as such minister at the English Court. During that time the name of the plaintiff was affixed in the sheriff's office, in the list of persons in the service of foreign ministers. The plaintiff, during the period for which the rate upon him became due, acted as prompter at the King's Theatre, in the Haymarket, and during the same period, and at the time when the distress was made, also was and acted as a teacher of music and languages, from all which employments he derived pecuniary advantage. His engagement as prompter at the King's Theatre was absolute, and contained no exception of the times when he might be engaged as chorister in the chapel of the Portuguese ambassador.

Campbell, for the plaintiff :

This case depends upon the construction to be put upon the

7th of Ann. *c. 12, s. 3, whereby it was declared, “ That all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador or other publick minister of any foreign prince or state authorised and received as such by her Majesty her heirs or successors or the domestick or domestick servant of any such ambassador or other publick minister may be arrested or imprisoned or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void, to all intents, constructions, and purposes whatsoever.” The history of the statute and the principles of the law of nations on which it is founded, are stated in 1 Bl. Comm. 254; Vattel, b. 4, c. 19, s. 120, c. 7, s. 104, and c. 8, s. 114. Two questions arise for the consideration of the Court: first, whether the plaintiff is a domestic servant of an ambassador; secondly, whether the warrant of distress, issued against the plaintiff’s goods, is such process as to come within the meaning of the Act. As to the first question, it is quite clear, upon the facts stated in the case, that the plaintiff was a domestic servant of the Portuguese ambassador. Suppose him to have been a native of Portugal, that he had come over with the ambassador, that he had lived in his house, and that his sole employment had consisted in the performance of those services which the case states him to have performed; undoubtedly, under such circumstances, he would have been considered a domestic servant of the ambassador. The functions of the plaintiff are such as if duly exercised will entitle him to the privilege claimed. No distinction can be made between a chaplain and a chorister, for it is found as a fact, that the service of the plaintiff was necessary in the latter *capacity, for the due celebration of divine service in the ambassador’s chapel. Then, is the case varied by the other circumstances that are stated? It makes no difference that the plaintiff is not a native of the ambassador’s country, for it has been held, that the privilege extends to the natives of the country to which the ambassador is sent: Vattel, b. 4, c. 19, s. 124, dict. per Lord MANSFIELD in *Lockwood v. Coysgarne*.† Nor is the case altered by a residence out of the ambassador’s house, for it may not be large enough

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† 3 Burr. 1676.

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to accommodate all his suite: *Widmore v. Alvarez*, † *Darling v. Atkins*. † The teaching of languages could not deprive the plaintiff of his privilege, he did that only when not employed for the ambassador; and as to letting lodgings, that might happen to the ambassador's secretary, yet it cannot be contended that he is not protected. The only exception in the 7th of Ann, of employments consistent with the service of the ambassador, is of traders within the description of any of the statutes against bankrupts; but the plaintiff does not fall within that description. In *Triquet v. Bath* § the English secretary of an ambassador was held to be a domestic servant, and the process issued against him was set aside; and the same was decided in *Evans v. Higgs*, || *Hopkins v. De Robeck*, ¶ in which latter case it was said by the Court that the words "domestic and domestic servant" were only put for examples in the statute. It has also been held, that *bonâ fide* service, as domestic physician to an ambassador, would entitle the party to protection: *Lockwood v. Dr. Coysgarne*. Can it be doubted that *this warrant of distress was "process whereby the goods of a domestic servant to an ambassador might be distrained?" In no case hitherto determined has any distinction been taken between persons and goods; and the only question has been, whether the party applying was the domestic servant of an ambassador. Then, in *Lockwood v. Coysgarne* the process was a *fi. fa.*, and although the execution was set aside on other grounds, it was not even suggested, that process against the goods was not within the meaning of the statute; and the same observation applies to *Fontainier v. Heyle*. ††

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E. Lawes, contra :

The privilege in question has never been extended to the goods of an ambassador's servant. Nor is there in the law of nations any thing to protect the goods of servants. Even the ambassador is not protected as to all his goods, viz. if brought over for the purposes of trade: Vattel, b. 4, c. 8, s. 114. And it is quite clear,

† 2 Str. 797; Fitzg. 200, S. C.

‡ 3 Wils. 33.

§ 3 Burr. 1478; 1 W. Bl. 471.

|| 2 Str. 797.

¶ 1 R. R. 650 (3 T. R. 79).

†† 3 Burr. 1731.

that the law of nations does not extend the privilege to any goods but those which belong to the embassy. In the present case, the dignity of the ambassador could not be injured by taking goods which did not belong to the embassy, so that no insult would be offered to the State whence he came, and no breach of the law of nations was committed. Now the 7 Ann. c. 12 was merely declaratory of the law of nations; nothing, therefore, can fall within it which does not constitute a breach of that law. Vattel, in the passage cited for the plaintiff, b. 4, c. 9, s. 120, is manifestly speaking of the persons of the ambassador's household; his observations are confined to them, and cannot by *any reasonable construction be applied to their goods. Grotius, *De Jure Belli et Pacis*, b. 2, c. 18, "*De legationum jure*," s. 8, has this passage (which is adopted by Molloy, b. 1, c. 10, s. 16), "*Comites quoque et vasa legatorum sui generis sanctimoniam habent;*" and in section 9, "*Bona quoque legati mobilia et quæ proinde habentur personæ accessio, pignoris causâ aut ad solutionem debiti capi non posse, nec per judiciorum ordinem, nec quod quidam volunt, manu regia verius est. Nam omnis coactio abesse a legato debet, tam quæ res ei necessarias quam quæ personam tangit, quo plena ei sit securitas.*" There is not in those passages a single syllable relating to any goods but those of the embassy, there is not even an allusion to the goods of the ambassador's servants. Bynkershoek, "*De foro legatorum*," c. 15, "*De comitibus legatorum*," speaks only of their personal immunity, and not of any privilege extended to their goods; and afterwards, speaking of the wives of ambassadors, he says, "*Uxores cum maxime inter legatorum comites numerandæ;*" and after citing several authorities, he adds, "*unde nec bona earum recte arresto detinentur, si detenta aliquando fuerint.*" Bynkershoek then, by expressly mentioning the goods of the wife, makes a distinction between her and the rest of "*comites*" as to that privilege. Wiquefort, in his *Office of Ambassador*, c. 28, puts a quære, whether the ambassador's goods and furniture are not in some instances liable to an execution, as, for instance, for the rent of his house, &c. *Lockwood v. Dr. Coysgarne*, and *Fontainier v. Heyle*, do not by any means establish that the goods are protected. If those cases are authorities for any purpose in the present case,

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they are in favour of the defendant, for the decision of the Court was against *the privilege upon other grounds. The question as to the protection of goods was not agitated, and the same may be said of *Delvalle v. Plomer*.† But, even if the Court should think that the goods of an ambassador's servant are privileged, still it is very doubtful whether the service in this case was such as to bring the plaintiff within the statute of Ann. *Triquet v. Bath*, *Evans v. Higgs*, and *Hopkins v. De Robeck*, decided nothing more than that the statute is not confined to menial servants. It cannot be collected from any of them that service at the ambassador's house is unnecessary, and unless that be held, the plaintiff cannot have judgment in this case. *Seacomb v. Bowling*,‡ *Malachi Carolina's case*,§ *Poitier v. Croza*,|| *Heathfield v. Chilton*,¶ shew that the contrary opinion has prevailed. Besides this, plaintiff had another engagement incompatible with the situation of a domestic servant to the Portuguese ambassador. The case states, that he was engaged as prompter at the Opera-house, without any reservation of liberty to absent himself when his service to the ambassador required it. *Masters v. Manby*†† and *Darling v. Atkins*‡‡ shew that this objection is decisive. Lastly, in *Vireash v. Becker*,§§ Lord ELLENBOROUGH says that there cannot be any great mischief likely to ensue from the personal restraint of the principal, if his functions may be delegated to another. There is no reason for supposing that the functions of the plaintiff could not be delegated to another, and therefore, it is not clear that his person is free from *arrest; *a fortiori*, then his goods must be liable to a distress.

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Campbell, in reply :

This is the first time that any attempt has been made to establish that the privilege conferred upon the person of an ambassador's servant does not equally apply to his goods. All the foreign writers who have been cited, first state what are the privileges of the ambassador, and then go on to say that the "comites

† 13 R. R. 746 (3 Camp. 47).

‡ 1 Wils. 20.

§ 1 Wils. 78.

|| 1 Bl. 48.

¶ 4 Burr. 2016.

†† 1 Burr. 401.

‡‡ 3 Wils. 33.

§§ 15 R. R. 483 (3 M. & S. 284, 289).

legatorum" shall enjoy the same privileges. It is, however, unnecessary to resort to them, the words of the 7 Ann. c. 12, s. 8, being decisive. "All writs, &c. whereby the person of any ambassador or his domestic servant may be arrested, or his, or their goods or chattels may be distrained, shall be void." The word "their" must necessarily include the servants. If any other construction be put upon it, the portfolio of a secretary containing the ambassador's dispatches may be seized. It is clear, that this objection was never thought of in *Lockwood v. Dr. Coysgarne*, or *Delvalle v. Plomer*, for it would have disposed of them at once, and the latter would never have been left to the jury on a question of fact had the law been clearly against the plaintiff. As to the nature of the service in *Poitier v. Croza*, *Lockwood v. Coysgarne*, *Fontinier v. Heyl*, *Darling v. Atkins*, *Masters v. Manby*, *Seacomb v. Bowling*, *Malachi Carolina's case*, and *Heathfield v. Chilton*, the service would have entitled the servant to the privilege claimed, had it been actually and *bonâ fide* performed, but in each of them it was disallowed on the ground of fraud, and on that ground only. Now, the service performed by the plaintiff was an important one, being necessary to some of the most solemn ordinances of the Roman *Catholic religion, and unless the plaintiff be privileged as he claims, the ambassador's chaplain may be arrested when he is proceeding to minister at the altar.

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ABBOTT, Ch. J. :

This was an action for breaking and entering the plaintiff's house, and seizing and distraining his goods. The defendant's case rested upon a warrant to distrain for the non-payment of poor-rates. It is found by the case, that the plaintiff is a British-born subject: that he occupied a house, of which he let out a part in lodgings; that he was a teacher of languages, and prompter at the Opera-house. My opinion is founded upon one point only, viz. that the action is for taking the plaintiff's goods, and not for arresting his person; as to which, I give no opinion. The question arises upon an Act of Parliament, framed in very general terms, "That all writs and processes, whereby the person of any ambassador, or other public minister of any foreign prince

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or state, authorised and received as such, or the domestic or
domestic servant of any such ambassador or other public minister,
may be arrested or imprisoned, or his or their goods or chattels
may be distrained, seized, or attached, shall be utterly void." The
expression is certainly large, but the Act itself was only
declaratory and in confirmation of the common law. It must,
therefore, be construed according to the common law, of which
the law of nations must be deemed a part. Adopting this rule of
construction, I am of opinion that whatever is necessary to the
convenience of an ambassador, as connected with his rank, his
duties, and his religion, ought to be protected; but that an
exemption from the burthens borne by other British subjects
ought not to be granted in a case to *which the reason of the
exemption does not apply. I do not say that the servant must
reside in the ambassador's house. I do not say that he may not
have an house fit and convenient for his situation as the servant
of an ambassador, nor that the furniture in such an house will not
be privileged. But the facts of this case are widely different from
those which I have mentioned. In this instance the servant let
a part of the house in lodgings. Such an house was not necessary
for the personal convenience of the plaintiff; and, therefore, could
not be necessary for that of the ambassador, his master. If we
should decide that the privilege given by the law of nations
extends to such a case as this, every servant of an ambassador
might take a large house, for the purpose of letting it out in
lodgings, and enjoy an exemption from the payment of taxes.
Such a privilege is absurd in itself, and not at all within the
reason upon which the rights of ambassadors are founded. I am
very sure that it cannot be the wish of any ambassador that his
servant should, by colour of those rights, inhabit such an house
for such purposes, without contributing to the public taxes of the
country where he resides. And I think that there is nothing in
the law of nations, or the statute of the 7 Ann. c. 12, which
entitles the plaintiff to recover in this action. Judgment of non-
suit must, therefore, be entered.

BAYLEY, J. :

This is not the case of an arrest of the person of an ambas-

sador's servant, nor are the goods seized such as were necessary in a residence of that description which the plaintiff's service to the ambassador required. The plaintiff's counsel claims an unrestrained *exemption of all goods, without entering into the question of their being necessary or not. The consequence of such a doctrine would be to enable the servant to abuse that privilege which was intended for the ambassador's convenience and not his own. Notwithstanding our decision in favour of the defendant, the plaintiff will still be able to execute all the necessary functions of his office. For these reasons I concur in thinking that the plaintiff is not entitled to recover.

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HOLROYD, J.:

I am of opinion that the plaintiff is not privileged under the circumstances of this case. It is contended, that, by serving the ambassador, he is entitled to an unqualified exemption of all his goods from seizure for taxes or otherwise. Even supposing him to be a domestic servant, he cannot have a privilege to that extent. The privilege is conferred by the law of nations, in order that the ambassador may not be prejudiced in his dignity or personal comfort; it is not given for the benefit of the servant. If the debt for which the seizure was made had arisen out of the plaintiff's situation, as servant to an ambassador, the result of this case might have been different. But that was not so, nor can the ambassador be at all prejudiced by that which has been done. The reason of the privilege, then, does not apply in this instance; the plaintiff, therefore, cannot have the benefit of it and judgment of nonsuit must be pronounced.

Judgment of nonsuit.

1823.
April 30.
 [565]

THE KING *v.* SIR JOHN FENTON BOUGHEY,
 BART., AND ROBERT FISHER, GENT.

(1 Barn. & Cress. 565—574; S. C. 2 Dowl. & Ry. 824; 1 L. J. K. B. 184).

Mandamus to the lord and steward of a manor to hold a court, and accept a surrender of a piece of copyhold land from A. and his wife, and admit B. Return, that there is a custom within the manor, that, if any person, not before being a customary tenant, or not being resident within the manor, takes any interest, as a purchaser by surrender or otherwise, of any lands, &c. within the manor, he shall pay for his fine on admission, as he and the lord can agree, which is usually assessed at two years' value; but persons already being customary tenants or resident within the manor, pay another and a smaller fine to the lord upon so taking any such interest; that B., having purchased the equity of redemption of a customary estate of considerable value, afterwards and before he was admitted to that estate, purchased the land in question, being a small customary estate, in order to be admitted to that first, and so elude the payment of the larger fine, whenever he should apply to be admitted to the larger estate, and by that means to defraud the lord of his said fine. Upon exceptions: Held, that the return was bad, for that B. might lawfully make such second purchase in order to avail himself of the custom in favour of the tenants of the manor.

Semble. That if the second purchase were fraudulent, still the purchaser would be entitled to admittance, but would not be thereby enabled to avail himself of the custom.

MANDAMUS, reciting, that at a customary court holden for the manor of Meer and Forton, November 23rd, 1821, John Booker and Mary his wife attended for the purpose of making a surrender of a piece of copyhold land, of and within the said manor, then lately sold by the said J. Booker to one Robert Stewart, who also attended the said court, to obtain admittance thereto, according to the custom of the manor; and that the lord and steward refused to receive the surrender, and grant admittance to Stewart; commanded the lord and steward of the manor to hold a customary court for the manor, and receive a surrender from J. Booker and Mary his wife, of the said piece of copyhold land, and grant admittance thereto to Stewart, according to the custom of the manor. The return by the lord and steward set out the following custom: that if any person, not before being a customary tenant, or not dwelling within the

† Cited in the judgment of NORTH, J., *Johnstone v. Spencer* (1885) 30 Ch. D. 581, 586. — R.C.

manor, shall take any estate as a purchaser, by surrender or otherwise, *of any lands or tenements, customary within the manor, that then he shall pay for his fine unto the lord of the manor for the time being, as the lord and he can agree; and that the custom has been to assess such fine at the full amount of two years' actual value of the estate; and that persons being customary tenants of the manor have paid another and smaller fine unto the lord of the manor for the time being on such admission. It then set out the following facts. Before the 22nd of September last, and before the holding of the customary court for the manor as in the writ mentioned, and the attending of J. Booker and Mary his wife, and Stewart, at the court, Stewart had become the purchaser of the equity of redemption of certain customary lands and tenements within the manor, such equity of redemption being previous to and at the time of the purchase thereof by Stewart, the interest of one W. S. Littler; Stewart, on or about the 22nd of September last, and before the holding of the said court, in the said writ mentioned, caused a notice in writing to be served on Sir J. Fenton Boughhey, whereby (after reciting that he the said R. Stewart had purchased the interest of Littler in certain lands and tenements, copyhold of the said manor, comprised in a surrender made and passed at a court held for the manor, on the 8th day of October, 1811, by Littler, to M. Mountford and A. Mountford, subject to a proviso for redemption and resurrender of the premises, on payment by Littler, or his assigns, on the 25th day of March, 1822, or any subsequent 25th of March, during his life, on six months' previous notice, of 300*l.* to M. Mountford and A. Mountford, their executors, &c.) he *gave notice that he intended to pay off the said sum of 300*l.* on the 25th day of March, 1822, in pursuance of the above condition. At the time of Stewart's making such purchase of the interest of Littler in the said messuages, lands, &c., as stated in the notice, Stewart was not a tenant of the manor, or dwelling within the same, and hath not at any time since become such tenant, or been dwelling within the manor, and the customary lands, &c., referred to in the notice, are of the annual value of 234*l.*, and in case Stewart should pay off the said sum of 300*l.*, not being a customary tenant, and not dwelling within the

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manor, should take an interest as a purchaser, by surrender or otherwise, of the last-mentioned lands, &c., he would be liable to pay a fine upon his admission, according to the custom above set forth. The piece of copyhold land in the writ mentioned, as having been sold by the said Booker to Stewart, is of very small extent, being in extent less than half an acre of land, and of very small annual value. Stewart purchased the said piece of copyhold land in the said writ mentioned, from J. Booker, after the purchase made by him of the interest of Littler, in the said lands and tenements stated in his said notice, in order that he (Stewart) might be admitted to the said piece of copyhold land, according to the custom of the manor, and might, by such admittance, become a customary tenant of the manor, before he should take, by surrender or otherwise, the customary lands and tenements mentioned in the notice of him the said Stewart; and for the purpose thereby of avoiding or eluding the payment of the fine which would become due to the lord of *the manor, by virtue of the custom above set forth, whenever he Stewart, not being a customary tenant, or not dwelling within the manor, should take the rest of the customary lands and tenements mentioned in his notice, as a purchaser by surrender or otherwise, and should be admitted to the same, and of depriving and defrauding the lord of the fine, payable according to the custom.

Patteson took five objections to the return :

First, that when R. Stewart applied to be admitted to the smaller tenement, the lord had, and still has, a complete tenant to the larger tenement. Secondly, that it does not appear that there is any custom compelling the purchaser of several tenements to be admitted to them in the order in which the purchases were made. Thirdly, that the interest which R. Stewart purchased in the larger tenement, was merely an option to repurchase it, contingent upon Littler's living till the 25th of March, 1822; therefore, at the time of his applying to be admitted to the smaller tenement, it was impossible for him to be admitted to the larger, or to know whether he ever could be admitted to it. Fourthly, that at all events Stewart was entitled to be admitted to the smaller tenement, and the question is

merely as to the quantum of fine which he ought to pay, in case he should hereafter be admitted to the larger tenement, which is the proper subject of an action after such admittance. Lastly, that Stewart is entitled to bring himself within the custom by any mode in his power, and to be admitted or not admitted to any tenement which he may have purchased, without regard to the lord's fine. *As to the first objection, the case of *Rex v. Lord of the Manor of Hendon*[†] is decisive. The Court there said, "All the lord has a right to require, is to have a tenant, and here he had one during the whole time." So in the present case, the lord by his own shewing has the Mountfords for tenants, and cannot, therefore, compel any one else to come in. An heir may be compelled to come in, but then the lord has no tenant. So a surrenderee may by special custom be compelled to be admitted: *King v. Dilliston* ;[‡] but no such custom is stated on this return, nor has any surrender been made by the Mountfords. The second objection is clear upon the face of the return, for unless there be a custom to restrain him, the purchaser of several customary tenements has a right to be admitted to them in any order that he pleases, and therefore a return, that the party had purchased another tenement before the one in question, but not showing such a custom, is no answer to the writ. As to the third objection, it must be collected from the return, that the Mountfords, to whom Littler had mortgaged, were admitted to the larger tenement, and then Littler would have no estate which he could surrender, for an equity of redemption cannot be surrendered: *King v. King* and another. § Nor had Littler or Stewart a right to pay off the mortgage, before the 25th of March, 1822: the Mountfords might have refused to receive it before that time. It was, therefore, quite uncertain whether Stewart would ever be in a situation to claim admittance, for Littler's contingent *interest could not be surrendered: *Doe v. Tomkins*,^{||} and the latter might have died before Stewart could be in a condition to compel the Mountfords to surrender. But, fourthly, Stewart was at all events entitled to be admitted to the estate which he purchased of Booker; and

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† 1 R. B. 527 (2 T. R. 484).

‡ 3 Mod. 221.

§ 3 P. Wms. 360.

|| 10 R. B. 467 (11 East, 185).

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if upon a subsequent application to be admitted to the tenement purchased of Littler, it could be shewn that the former transaction was fraudulent, he might still be liable to the larger fine. But the question as to the amount of the fine does not arise here, for no fine at all is due until after admittance: *Rex v. Lord of the Manor of Hendon*,† *Graham v. Sime*,‡ *Hobart's case*.§ Lastly, there is not any pretence for imputing fraud in this case. There is a custom in the manor, that customary tenants shall be admitted to any tenements which they purchase, upon payment of a smaller fine than other persons, and Stewart has openly and fairly endeavoured to avail himself of that custom which by law he may do. It is admitted that the purchase from Booker was a *bonâ fide* purchase, for the return does not state any thing to the contrary.

He was then stopped by the Court.

W. E. Taunton, contra :

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The cases cited on the other side do not apply to the present. The return is, for the purposes of this argument, admitted to be true, and the return charges fraud. It states that Stewart purchased the piece of land in question from Booker, in order that he might become a customary tenant of the manor before he should take by surrender or otherwise, the lands purchased *of Littler. It charges, that he did that for the purpose of thereby avoiding and eluding the payment of the fine, which would become due to the lord of the said manor by virtue of the custom above set forth, whenever Stewart, not being a customary tenant, should claim to be admitted to those lands, and of depriving and *defrauding* the said lord of the fine, payable according to the custom. The return, therefore, expressly charges fraud, and the party may bring an action for a false return if that charge is groundless. It is also material to observe, that Stewart actually gave notice to the lord, that he meant, at a certain time, to pay off the mortgage upon the estate which he purchased of Littler; which clearly shews, that the small estate was purchased for the

† 1 B. R. 527 (2 T. R. 484).

‡ 6 B. R. 356 (1 East, 632).

§ 4 Co. Rep. 27 a.

purpose of eluding the fine, which would otherwise have been payable for the other.

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ABBOTT, Ch. J. :

I am of opinion that this return is insufficient in law. It appears that there is a custom within the manor, that if any person not being a customary tenant takes any estate as a purchaser, by surrender or otherwise, of any lands or tenements customary within the said manor, he pays a certain fine; but if he so takes such estate, being a customary tenant, he pays a much smaller fine. The lord contends that no person, intending to purchase and be admitted to a large estate, can bring himself within the custom by first purchasing a smaller; and the return charges that Mr. Stewart, under such circumstances, purchased the smaller estate for the purpose of defrauding the lord. It is, however, for us to decide, whether or not the circumstances disclosed in the return *constitute a fraud in law. I am by no means prepared to say that they do. It may always be a question, whether the purchase of the smaller tenement be or be not *bonâ fide*, but that is a question of fact. If the return had stated that the smaller purchase was colourable, I should have thought that we ought not to assist the party by this prerogative writ, for then he would be endeavouring to avail himself of the custom without being really and truly a customary tenant of the manor. But upon this return, it must be taken that the purchase from Booker was a *bonâ fide* transaction, the party has done all that he can to make himself really a customary tenant of the manor; I cannot then say that this is any fraud in law, and a peremptory mandamus must be awarded. [*572]

BAYLEY, J. :

I am of opinion that this is a bad return. The mandamus directed the lord and steward of the manor in question to accept a surrender from Booker and his wife, and admit Stewart. Until the surrender and admittance were complete, the surrenderors would remain tenants, and, as such, would be liable to various burthens. They, therefore, had a right to insist upon

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the acceptance of their surrender, and the admittance of the surrenderee. The writ is resisted on the ground of fraud in Stewart, but no fraud in law is alleged. It is true that the return charges fraud, but then it sets out the circumstances which are supposed to constitute the fraud, and they shew that the term is used in an improper sense. It appears from the facts stated, that a party who had contracted for the equity of redemption of a customary estate meant at a future time to *purchase the legal estate, and entitle himself to be admitted to it. In the mean time he might rightfully obtain a smaller estate, in order to avail himself of the custom in favour of customary tenants of the manor. It will always be a question, whether the purchase of the smaller estate be fraudulent or not, but that relates only to the purchase, and not to the object with which it is made. If the purchase be merely colourable, it is fraudulent; but nothing of that kind being stated, I cannot say that there is any fraud in the present case. But, even admitting that the second purchase were fraudulent, it is by no means clear, that the return would be sufficient; for then, when the party applied for admittance to the larger estate, the lord might demand the same fine that would have been payable if the second purchase had not been made, because fraud cannot assist the party committing it. But at all events, as the surrender is quite free from suspicion, and nothing amounting to a fraud on Stewart's part is stated in the return, I think that it must be quashed, and that a peremptory mandamus must issue.

HOLROYD, J. :

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This return is insufficient in point of law. The mandamus issued at the instance not only of Stewart but also of Booker and his wife. If the parties are attempting to commit a fraud, the whole transaction is void, but no fraud is suggested as to Booker, and therefore the mandamus should go not only to compel the acceptance of the surrender, but also to admit Stewart; for until admittance the estate is not completely taken out of the surrenderee. If the lord can shew fraud on the part of Stewart, he may perhaps, *on a future occasion insist, that the latter is not a customary tenant, within the meaning of the

custom. In that case the lord may be entitled to demand the larger fine, whenever Stewart claims to be admitted to the estate which he purchased of Littler; but that is a question which it is unnecessary for us to decide, as the return does not contain any sufficient allegation of fraud. For these reasons, I agree with the rest of the Court, in thinking that the return must be quashed.

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Return quashed, and peremptory mandamus awarded.

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SAME v. HUMPHREY WILLYAMS.

1823.

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(1 Barn. & Cress. 609—622; S. C. 3 Dowl. & Ry. 75—83.)

Where the charter of a corporation (having a certain definite number of capital burgesses) provided that, “when any one or more of the capital burgesses for the time being should die, or dwell without the borough, or be removed from his office, it should be lawful to the other capital burgesses ‘at that time surviving and remaining, or the greater part of the same,’ of whom the mayor was to be one, to elect another, or others of the burgesses of the said borough, into the place or places of the capital burgess or burgesses so happening to die, &c.”: Held, that a majority of the entire body of capital burgesses, and not merely of those then existing, must be present to make a good election under that clause.

INFORMATION, in the nature of *quo warranto*, calling upon the defendant, Devonshire, to shew by what authority he claimed to have and exercise the office of capital burgess of the borough of Truro. The plea set out various parts of a charter granted by Queen Elizabeth relating to the constitution of the corporation, and the election of the mayor, aldermen, steward, capital burgesses, and recorder, (which it is unnecessary to insert here, as they are fully stated in the judgment delivered by the LORD CHIEF JUSTICE,) and then averred that J. J., a capital burgess of the said borough, died, and that the mayor and the major part of the capital burgesses, surviving and remaining at the time of the death of the said J. J., duly met and elected him (Devonshire) to the office. Replication, That the mayor and eleven *capital burgesses, and no more, were present at the said

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meeting. 10thly, That by the charter two aldermen were required to be present at all elections of officers; and that two were not present at the time of the supposed election of the defendant. This replication set out parts of the charter relating to the election of a recorder, upon the death or amotion of any person filling that office; and also the mode of electing a coroner and constables. (These were fully stated in the judgment of the Court.) Demurrer and joinder. The pleadings in *Rex v. Willyams* were the same, except that the election of the defendant was alleged to have been made by the mayor and the major part of the capital burgesses surviving and remaining at the time of the election.

The case was argued in Hilary Term, 1822, and again in this Term.

Tindal, in support of the demurrer, contended, first, that, under the words of this charter, it was not necessary that a majority of the whole body of capital burgesses should attend. The words "surviving and remaining" distinguish this from *Rex v. Bellringer*,† and all that class of cases; and *Rex v. Hoyte*; shews that the election was a good one, as a majority of the existing body did attend. The mayor, being one of the capital burgesses, the whole number besides him would be twenty-three: *Rex v. Thornton*;§ and, therefore, when J. J. died, the mayor and eleven capital burgesses, whom the replication admits to have been present at the meeting, would be a majority of the existing body. *Secondly, the words of the charter, requiring two aldermen to attend at the election of officers, do not apply to this case. A capital burgess is one of the corporation itself, and not an officer within the meaning of that clause. The clause directing his election does not in terms require the attendance of the aldermen; but the clause as to the election of recorder does expressly make their presence necessary.

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Cross, *contra*, contended, that, according to the principle laid down in *Rex v. Bellringer*,† recognised and confirmed in

† 4 T. R. 810.

§ 4 East, 294; 1 Smith, 109.

‡ 6 T. R. 430.

Rex v. Miller,† *Rex v. Morris*,‡ and *Rex v. Bower*,§ where an election is to be made by a definite body in a corporation, the greater part of that entire body must attend, notwithstanding the introduction of the words “for the time being,” or others of the like import. The words “surviving and remaining,” in this charter, are manifestly used in the same sense as “for the time being,” for those expressions are indiscriminately introduced into various parts of the charter. Secondly, capital burgesses are within the meaning of the word “officers,” so as to make the presence of two aldermen necessary at the election. The word “office” is applied to capital burgesses throughout the charter.

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Cur. adv. vult.

The judgment of the COURT was now delivered by

ABBOTT, Ch. J. :

By the pleadings in these cases, it appears that there are in the borough of Truro a mayor, a certain definite number of capital burgesses, and four *aldermen, being part of that number of capital burgesses, whatever that number ought to be. That upon a vacancy, occasioned by the death of one of the capital burgesses, the defendant was elected at an assembly, consisting of the mayor and eleven capital burgesses. In one of the cases it is alleged, that this number of eleven was a majority of the whole number of capital burgesses, who were surviving and remaining at the time of the happening of the vacancy, which the defendant was elected to supply: and in the other of the two cases it is alleged that this number of eleven was a majority of the whole number who were surviving and remaining at the time of the defendant's election. It further appears, that in fact there were not among those eleven capital burgesses any two who were also aldermen of the borough. There may be a doubt, whether the number of capital burgesses in this borough ought to be twenty-four, including and reckoning the mayor as one of the twenty-four: or, whether it ought to be twenty-four exclusive of the mayor, and, therefore, making, with him, the number of

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† 3 R. R. 172 (6 T. R. 268). ‡ 4 East, 17. || P. 476, *ante* (1 B. & C. 492).

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twenty-five; but this point is not material to the present cases. In these cases two questions of law have arisen; first, Whether it be necessary that an assembly for the election of a capital burgess should consist of such a number of persons, including the mayor, as will be more than half the number of twenty-five or twenty-four, or, not including the mayor, will be more than half the number twenty-four or twenty-three; for if a majority, according to either of these reckonings, be necessary, then the number of persons assembled, being twelve only, including the mayor, was insufficient. The decision in the case *of *The King v. Thornton*† is not an authority for the present case; and it is not necessary to consider whether the construction which the Court appear to have been inclined to put upon the charter of Nottingham, in that case, as to the requisite number of aldermen, be or be not correct; though it may be proper to observe, that the provisions of that charter, as they regard a point of this kind, are materially different from the charter of Truro.

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Secondly, whether it be necessary that of the persons assembled, whatever their number ought to be, there should be at least two in whom the office of alderman is united with the office of capital burgess; for if this be necessary, then the assembly, however sufficient in point of number, was incompetent in regard to the official character of the persons of whom that number was composed.

This is the case of a borough constituted under an existing charter of the Crown, which is set forth in the pleadings; and, therefore, each of these two questions is to be answered and resolved by the language of the charter; and, upon consideration of the charter, we are of opinion, that the assembly at which the defendant was elected was insufficient in point of number; and it is, therefore, unnecessary to give any opinion on the second question.

The number present was not a majority, according to either of the methods of reckoning before mentioned, and it has therefore been argued, that, according to this particular charter, it is not necessary that the assembly should consist of such a

† 4 East, 294; 1 Smith, 109.

majority; but that, according *to the allegations in one of the cases, it is sufficient if the assembly consist of such a number of capital burgesses as will constitute a majority of the whole number of capital burgesses, who, at the time of the vacancy occurring, may happen to be surviving and remaining; and that, according to the allegations in the other case, it is sufficient, if the assembly consist of a majority of the whole number, who, at the time of assembling, may happen to be surviving and remaining.

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Now it has been decided, in the case of *The King v. Bellringer*,† and others quoted at the Bar, that where, by the provisions of any charter, an election is to be made by a body consisting of a definite number (as distinguished from a body consisting of an indefinite number) “for the time being or the major part of them,” as of a mayor and aldermen, mayor and capital burgesses, mayor, aldermen, and capital burgesses for the time being (or the like) or the greater part of them, a good elective assembly cannot be had without the presence of such a number of persons as will constitute a majority of the entire definite number, although the number present may constitute a majority of so many of the entire number as may happen at the time to be surviving and existing. From the time of the decision of the case of *Rex v. Bellringer*, this has been taken as a general and established rule of corporation law; and it appears by the report to have been so understood and considered before that time. The reason of the rule I take to be this; where the Crown has by its charter constituted a corporate body, or any integral part of a corporate body (if as usual the whole corporation consists of several *parts) composed of a certain defined and specified number of individuals, and has by the same charter given certain powers and authorities to a body so constituted, and has ordained a method of supplying vacancies from time to time, so as to give perpetual existence to the body, notwithstanding the necessary failure of its individual members: it cannot be supposed that the Crown intended that the powers and authorities so given to a body consisting of such a defined number of persons, should be exercised by a much smaller number, as by only two

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† 4 T. R. 810.

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or three, or that the individuals composing the body should at their pleasure increase their personal influence and authority, by suffering a gradual diminution of their number, and forbearing to exercise the power of renovation and supply, for which a method has been ordained. If you extract from a charter a single sentence expressed in the words that I have mentioned, as for instance, "It shall and may be lawful for the mayor and aldermen of the said city for the time being, or the greater part of them," from time to time to make an election of an officer, or do any other act, and look at the sentence so extracted, singly and by itself, it may stand doubtful, whether the words "or the greater part of them," ought, in construction, to be referred to the first part of the sentence, that is, to the words "the mayor and aldermen of the said city," so as to denote the greater part of that number of individuals, whereof the mayor and aldermen originally consisted; or whether they ought, in construction, to be referred to the whole of the preceding words, that is, "the mayor and aldermen of the said city for the time being," so as to denote only the greater part of the number of individuals whereof the body of mayor and aldermen may happen *at the particular time to consist. But if, instead of extracting such a sentence from the charter, and viewing it singly and by itself, you look at it in context and conjunction with the whole instrument, as most undoubtedly you ought to do, the doubt is cleared up, by the manifest intention of the Crown, and by the departure from that intention that must necessarily ensue, if you give to two or three persons the authority originally given to twelve or twenty-four. A rule so reasonable having been established, it is, in our opinion, incumbent upon the Court to abide by and enforce it, and for the prevention of litigation, to extend rather than to narrow it, and on no account to depart from it, unless the language of a particular charter, or a long usage, leading to the presumption of a charter so expressed, be such as to conduce plainly to a different exposition. And this brings me to the consideration of the language of the particular charter of Truro, as set forth upon the record in these causes. The charter is set out partly in the plea and partly in the replication, and, therefore, we have

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not so ready and commodious a view of it, as we should have if the whole had been set out at once, and in the order of the original. But I think we have a sufficient knowledge of its contents for the purpose of a judgment, on the points before us. The charter begins by ordaining that the borough shall be a free borough, and that from thenceforth for ever there shall be a body politic and corporate by the name therein mentioned; and that, from thenceforth for ever, there shall be in the borough twenty-four of the more honest and discreet inhabitants, who shall be helping and assisting to the mayor in all causes and matters touching the borough. A certain individual is afterwards named to be the first mayor, and twenty-four *other individuals are afterwards named to be the first capital burgesses and counsellors; and there is a method appointed for supplying vacancies, and certain powers are vested in the mayor and capital burgesses. So that the intention of the Crown to maintain for ever a body consisting of twenty-four individuals to exercise the powers given by the charter, is clear and manifest. The charter contains two clauses for supplying vacancies in the number of the capital burgesses. The first is general, applying to all cases of vacancy, whether by death or removal. The second is confined to cases of vacancy occasioned by removal. The vacancy upon which the defendant was elected was occasioned by death, and his election is, therefore, under the first of the two clauses, which is as follows: "And the said Queen by her letters patent, for herself, her heirs, and successors, did will and grant to the aforesaid mayor and capital burgesses of the borough aforesaid, and their successors, that when and so often as it should happen, that any one or more of the aforesaid twenty-four capital burgesses or counsellors of the same borough for the time being should die or dwell without the aforesaid borough, or should be for any cause removed from his office of capital burgess aforesaid; that then, and so often, it should and might be lawful to the other capital burgesses of the aforesaid borough at that time surviving or remaining, or the greater part of the same, of whom the said Queen was willing that the mayor for the time being should be one, to elect, nominate, and prefer another or others of the burgesses of the borough aforesaid into

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the place or places of him or them, the same capital burghess or counsellor, capital burghesses or counsellors, so happening to die or be removed; and that he or they so *elected and preferred, having first taken a corporal oath before the mayor of the borough aforesaid for the time being, should be of the number of the aforesaid twenty-four capital burghesses and counsellors, and that so often as the case should happen." Upon this clause it has been contended on the part of the defendant, that the words, "at that time surviving or remaining, or the greater part of the same," denote plainly that the choice may be made at an assembly consisting of a majority of the number actually surviving and remaining at the time of the vacancy in one of the cases, and at the time of assembling in the other, although less than a majority of the entire definite number when full and complete; and that the insertion of these words distinguishes the present case from all those to which I have alluded, wherein the words were, "for the time being."

On the other hand it has been contended on the part of the Crown, that these words, "then surviving and remaining," are precisely of the same import and meaning as the other words "for the time being," and we are of that opinion. This charter, like all other instruments, may be best expounded by itself. No reason can be assigned for allowing a capital burghess to be chosen by a less number of persons than is required for the choice of a mayor, alderman, steward of the court, coroner, or constable, each of whom is to be chosen by the same body; and if there be no reason whereon to found a distinction, a distinction ought not to be made without words plainly denoting that a difference was intended. The office of alderman is, in this corporation, an annual office; and by the charter, the aldermen are to be chosen yearly out of the twenty-four capital burghesses by the major part of the same twenty-four capital *burghesses. The clause appointing the choice of mayor is this, "The mayor and capital burghesses for the time being, or the greater part of them from time to time, shall have power yearly, on the 9th of October, of nominating, and shall and may nominate one man, being an alderman, before the other aldermen and capital burghesses of the borough then and there present, to be the

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mayor for one year then next following." The clauses for electing a coroner and constables are precisely of the same import as this for the election of mayor. The clause for appointing a steward of the court is to this effect. The mayor and capital burgesses, or the major part of them, (without the words "for the time being,") of whom the mayor for the time being to be one, from time to time, whenever it shall please the mayor and capital burgesses, or the major part of them, shall have authority to nominate a person learned in the law to be the steward of the court of the borough. These five elections must therefore, according to the decisions referred to, be made at an assembly consisting of a majority of the entire definite body.

The only other officers of whom the election is specially directed by the charter, are the recorder and the capital burgesses. The charter contains two clauses as to each of those elections, and (which is very remarkable) with a similar variation of phrase as to each. No person appears to be named to the office of recorder in the charter. The first clause for the election of that officer is to this effect. The mayor, aldermen, and capital burgesses, or the greater part of them "for the time being," from time to time, as and when it shall be necessary, may and shall have power whensoever, and as often as it shall please them, or the greater part of *them, to elect a fit person to be recorder, to execute the office of recorder as long as he shall conduct himself well in the said office. This clause is apparently sufficient to provide for the election, not merely of a first recorder, but of a succession of recorders, and an election under this clause must, according to the decisions, be made at an assembly consisting of the majority of the entire number; unless it shall be held, that a different construction is to prevail, if the words "for the time being" happen to follow the words, "or the greater part of them;" from that which has been given, where the words "for the time being" preceded the words, "or the greater part of them," which would introduce a subtile distinction never contemplated by the Crown, or by those who have been entrusted with the framing of corporation charters, who have placed these words sometimes in one order and sometimes in another.

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There is, however, another clause directing the election of a

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[*621] it may be concluded that the sense is the same although *the phrase be varied. Then, as to capital burgesses, which is the office in question, there is, in addition to the general clause that I have already quoted, another clause, confined to a choice in case of vacancy by amotion, which is to this effect. The mayor and burgesses (that is, the corporation generally) shall have power by the common council (that is, the mayor and capital burgesses), or by the greater part of them (without the words "for the time being"), any one or more of the capital burgesses for the time being, for any cause to them or the greater part of them seeming reasonable, from his office of capital burgess to remove, and in the place or places of such capital burgess or burgesses any one or more of the burgesses and inhabitants of the said borough to elect and prefer; and this when and so often as it shall happen, or to the mayor and capital burgesses, or the greater part of them, "for the time being," it shall seem convenient, necessary, or fitting. According to this clause, if it stood alone, the election to supply a vacancy occasioned by amotion must, for the reasons before given, be by a majority of the entire definite number. And as there can be no reason assigned for a variation in the constitution of the elective assembly in the cases of vacancy by death and by amotion, and as each of the two clauses provides for an election in the case of vacancy by amotion, we conclude here also, that the sense of the two clauses is the same, although the phrase be varied. And this construction gives one plain and uniform rule for all the elections of all the corporate officers, appointed by this charter to

be elected by the same body of mayor and capital burgesses. THE KING
 Whereas a contrary construction would introduce a different DEVONSHIRE.
 mode of election to different offices, though, by *the same class [*622]
 of electors, would allow two modes of election to the office of
 recorder, and two also to the office of capital burgess, on a
 vacancy by amotion, and would leave but one of those modes
 capable of being adopted on a vacancy by death. Now, this
 would be so useless, and so likely to lead to errors and mistakes,
 that it is impossible to suppose it can have been intended by the
 Crown. And therefore, as there does not appear any manifest
 intention in this charter to introduce a mode of election different
 from that which was held to be established by the charter in the
 case of *The King v. Bellringer*; and as it is desirable, for the
 reasons already given, to compel the members of a definite body
 in a corporation to keep up their full number; and as nice and
 subtile distinctions upon the language of instruments of the same
 general nature ought to be discountenanced, we are of opinion
 that the elective assembly in each of these cases was deficient in
 point of number; and, consequently, that judgment ought to be
 given for the Crown.

Judgment for the Crown.

1823.
May 23.

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(1 Barn. & Cress. 666—674; S. C. 3 Dowl. & Ry. 84; 1 L. J.
 K. B. 202.)

A testator being seised of the mansion-house of B. for his life, and being the owner of certain household furniture, pictures, &c., therein, bequeathed the latter to trustees upon trust to permit the same to be held and enjoyed by the person who for the time being would be entitled to the possession of his freehold estates; and he further directed that whilst the said freehold estates should be held and enjoyed by the person entitled to his said mansion-house the said chattels should be kept in the mansion-house, and not removed therefrom unless with the consent of the trustees. Upon the death of the testator, the goods and chattels were in the said mansion-house, and his son then became seised of the freehold estates, and entitled to the mansion-house for his life, and remained in the occupation of the same, and of the household furniture, &c. mentioned in the will: Held, that even if the son of the testator had been a trader, and become bankrupt, and had had the goods in his possession at the time of the act of bankruptcy, under the above circumstances, they would not have passed to his assignees as property in his order and disposition within the meaning of the 21 Jac. I. c. 19,† and therefore that a collector of taxes was not justified in distraining these goods for taxes due from the son in respect of horses, carriages, dogs, &c. under the 43 Geo. III. c. 99, s. 38,‡ by which collectors of taxes are authorised to use all remedies and powers which, by any acts concerning bankrupts, are given to creditors. *Quære.* Whether that section applies to persons not subject to the bankrupt laws.

By sect. 33 of the 43 Geo. III. c. 99‡ it is enacted, “that if any question or difference shall arise upon taking any distress, the same shall be determined by the commissioners of taxes:” Held, that as the jurisdiction of the superior courts was not expressly taken away, an action at common law was maintainable for a wrongful distress.

THIS was a special action on the case, by the plaintiffs, as the owners, under trust, of household furniture, pictures, &c. in the mansion-house of Blenheim, which were held and enjoyed, with their consent, by the Duke of Marlborough, under those trusts, against the defendant, a collector of taxes, for wrongfully distraining those goods for taxes and duties upon windows, and inhabited houses charged upon the mansion-house, and for other taxes upon male servants, carriages, horses, dogs, &c. due from the Duke. There was also a count in trover. Plea, not guilty.

At the trial before Abbott, Ch. J., at the Middlesex sittings in

† Repealed, 6 Geo. IV., c. 16, s. 1. ‡ Repealed 43 & 44 Vict. c. 19, s. 4.

Easter Term, 1822, the jury found a verdict for the plaintiffs, subject to the opinion of the Court on the following case :

George, late Duke of Marlborough, was, in his lifetime and up to the time of his death, owner of the goods and chattels mentioned in the declaration, and was seised of the mansion-house of Blenheim for the term of his natural life ; and by his will, dated the 3rd day of March, 1812, gave and bequeathed the said goods and chattels to the plaintiffs, upon trust to permit the same to be held and enjoyed, so far as the rules of law and equity would permit, by the person who, for the time being, would be entitled to the possession of his freehold estates therein-before devised to the Marquis of Blandford, now Duke of Marlborough, for his life, with such remainders over as therein mentioned. And the testator directed that, whilst his freehold estates should, under the limitations in his will, belong to and be held and enjoyed by the person or persons entitled by Act of Parliament to his aforesaid mansion-house, gardens, and pleasure-grounds at Blenheim, the chattels should be kept and preserved in the same mansion-house, gardens, and pleasure grounds, and should not be removed therefrom, unless with the consent of the trustees. And he appointed the trustees executors of his will. The late Duke, before the seizure of the goods and chattels mentioned in the declaration, died, and at the time of his death the goods and chattels were in the mansion-house at Blenheim. Upon the death of the late Duke, the present Duke of Marlborough became seised of the mansion-house at Blenheim for the term of his natural life, and he has ever since occupied and still continues to occupy it. From the death of the late Duke and up to the time of seizing and distraining the goods and chattels, they remained in the mansion-house *at Blenheim, in the use of the present Duke. Robert Russell, the defendant, was the collector of certain duties granted and assessed by the statute 43 George III. c. 99, and other subsequent Acts, and the other duties of assessed taxes for the division of Blenheim, and had the usual warrants of the commissioners acting under the said Acts delivered to him at the time of his appointment. At the time of distraining the goods and chattels mentioned in the declaration certain taxes and duties were charged, and were due from the

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present Duke of Marlborough to his Majesty. The window-taxes and duties, amounting to the sum of 67*l.* 15*s.* 6*d.*, were charged upon and were due from the said present Duke in respect of the mansion-house at Blenheim; the rest of the taxes and duties were assessed upon the several articles before mentioned, returned by the present Duke to be paid for at Blenheim aforesaid. Before any distress was made for the said arrears of taxes and duties, the defendant made a demand of the same, as they became due from the present Duke, and required him to pay them; but he did not do so. On the 10th May, 1821, the goods and chattels of the plaintiffs, mentioned in the declaration, were distrained by the defendant for the said several and respective taxes and duties payable to his Majesty, so assessed and charged upon the present Duke. The plaintiffs, after the seizing of the goods and chattels, tendered and offered the defendant to pay him the sum of 67*l.* 15*s.* 6*d.*, the amount of the house and window taxes and duties, and also the sum of 50*l.*, the same being a competent sum for the expenses of keeping and selling such part of the goods and chattels as were proper and necessary to be sold for the payment of the *said house and window taxes and duties, and demanded and required of the defendant to deliver to the plaintiffs the goods and chattels so seized and taken: but the defendant refused to deliver them.

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Rogers, for the plaintiffs:

The assessments are made under the 43 Geo. III. c. 161, and the mode of the recovery of arrears due upon them is prescribed by 43 Geo. III. c. 99. The Act of the 43 Geo. III. c. 161, is divided into two classes, the first of which has reference to the assessments A and B, which are the assessments on windows and houses; the second refers to assessments C, D, E, F, G, H, I, J, K, the assessments for the other taxes. In the first class the charge is made upon the premises, in the second on the person. The 43 Geo. III. c. 99, s. 38, provides a separate remedy for the recovery of arrears due upon each class of assessment, viz. to distrain upon the messuages, lands and tenements charged, and to distrain the person charged by his or their goods and chattels, and all such other goods and chattels as they are

thereby authorized to distrain, without further warrant from the commissioners. The latter words do not give any new or original power, much less are they intended to extend either of the powers previously given; but they apply to particular cases expressly provided for, and mean only that in such cases the collector may proceed without any further authority. One of these cases is contained in 43 Geo. III. c. 99, s. 37; and another is mentioned in the 43 Geo. III. c. 161, s. 55.† It is clear from both these statutes that the two classes of assessments were intended to be kept distinct, and that the two remedies were to be specifically applied. But these goods were not liable under either class of assessment: they were *neither goods on the premises charged, nor of the person charged, nor did they fall within the particular cases to which the words, “such other goods as the collector is hereby authorised to distrain,” apply. As to the property in the goods, the Duke of M. has none of which a court of law can take cognizance. The words in the will, “as far as the rules of law or equity will permit,” shew that the Duke was not to have even the use of them in a manner inconsistent with the absolute devise to the trustees; nor is there a pretence for saying that the apparent possession was tainted with fraud; for it was a possession in execution of the trust, which Lord MANSFIELD, in *Cadogan v. Kennet*,‡ considers as a circumstance which conclusively negatives fraud.

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Parke, contra :

It is perfectly clear that for arrears of taxes on houses and windows the collector has a right to distrain any goods of a third person found on the premises charged: *Juson v. Dixon*.§ With respect to the mode of recovering those taxes which are charged upon the person, it is material to advert to the 38th section of the 43 Geo. III. c. 99. By that section, all remedies, advantages, powers, &c. which, by any Acts concerning bankrupts, or concerning the method of recovering rent in arrear, are given or granted to any creditors, lessors, or landlords respectively, shall be used and practised by such respective commissioners, and by any collector acting under their authority, for the recovering and

† See 43 & 44 Vict. c. 19, ss. 4, 7. ‡ Cowp. 432. § 1 M. & S. 601.

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securing any arrears of such duties over and above the powers and remedies contained in that Act. Now the assignees of a bankrupt would *be entitled to recover these goods as goods in the order and disposition of the bankrupt, with the consent of the true owner. Besides, an action at common law is not maintainable, even if the taking were wrongful; for section 33 enacts, "that if any question or difference shall arise upon taking such distress the same shall be determined and ended by two or more of such commissioners." The subject-matter of this action was a question or difference arising upon taking the distress, and therefore ought to have been determined by the commissioners.

BAYLEY, J. :

I am of opinion that the plaintiffs are entitled to recover. The distress in this case is for taxes, which the Act of Parliament charges, not upon the premises, but upon the person of the individual. The question therefore is, whether the law has given the remedy by distress in such a case. Now by the 43 Geo. III. c. 99, s. 33, the collectors are authorized to distrain upon the messuages, lands, tenements, and premises charged with any sum of money, or to distrain the person so charged by his goods and chattels, and all such other goods and chattels as they are thereby authorized to distrain. There are, therefore, three classes of cases in which the distress is lawful: first, it is lawful to distrain goods on the premises charged; secondly, goods of the person charged; and, thirdly, goods authorized to be distrained by the particular provisions of the Act. Now it lies upon the party making the distress to shew that it is lawful. No particular provision of the Act has been pointed out to us by the defendant's counsel by which any goods, except those of the person charged, are liable to be distrained in respect of taxes *charged upon the person of the individual, and, therefore, we must take it that there is no express provision authorizing the collector in such a case to seize any goods not the property of the person charged. That being so, the question is, were these the goods of the person charged? The person charged in this case was the Duke of Marlborough; but the goods seized were, in point of law, the

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property of the trustees. The Duke of M. had the use of them in a particular mode, but they were not to be taken off the premises; he had the custody of them under a trust, but nothing more. It is clear, therefore, that these were not the goods of the person charged. It has been argued, however, that if the Duke had been a trader, and had become bankrupt, and the goods had been in his possession under the circumstances mentioned in the case, at the time of the bankruptcy, that they would have passed to his assignees as property in his order and disposition, with the consent of the true owner, within the 21 Jac. I. c. 19, s. 11, and therefore that the collector was entitled to seize them under the 48 Geo. III. c. 99, s. 38, by which "all remedies, which by any act or acts concerning bankrupts were given to any creditors, are granted to the commissioners and the collectors therein mentioned." Now, without deciding whether that clause would apply to a person in the situation of the Duke of Marlborough, who is not a trader, and therefore not subject to the bankrupt laws, (which may be doubtful,) it appears perfectly clear, upon the authority of decided cases, that if he had been a trader and a bankrupt, and had had the goods in his possession at the time of his bankruptcy, under the circumstances stated in this case, they would not be considered as in his order and disposition with *the consent of the true owner, within the meaning of the 21 Jac. I. c. 19. In *Jarman v. Woolloton*,† a woman before marriage, with the consent of her intended husband, conveyed all her stock in trade and furniture to trustees, to enable her to carry on her business separately; it was held, the husband not having meddled with them, and there being no fraud, that such effects (though fluctuating) were not liable to his debts upon his becoming bankrupt; and that case was decided on the ground, that the husband had not the order and disposition of the property with the consent of the real owner, for the trustee was the legal owner, and he gave no consent for such purpose. In *Darby v. Smith*,‡ the assignees were held entitled to recover, on the ground that the trustees had assented to the husband's

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† 1 R. R. 780 (3 T. R. 618).

‡ 8 T. R. 82.

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having the apparent order and disposition. It is a material circumstance in this case, that the goods never had belonged to the present Duke of Marlborough. They had belonged to the former Duke, and any person who wished to trace the ownership by referring to the proper depositary of his will, would have learned that the present Duke had only a limited use of the goods, and that he had no more control over them than a lodger in a ready furnished house has over the furniture. The trustees were the real owners, but they did not permit him to have the order and disposition of the goods. The only power he had over them, was derived not from them, but from the will of the late Duke. As to the other objection, that this action is not maintainable, and that the matter was determinable by the commissioners only, I am of opinion, that inasmuch as *the right to resort to the superior courts of law can only be taken away by express words, and as there are none such in this Act of Parliament, this action is properly brought. For these reasons the judgment must be for the plaintiffs.

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HOLROYD and BEST, JJ., concurred.

Judgment for the plaintiffs.

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COLLINS AND OTHERS v. PROSSER AND OTHERS,
EXECUTORS OF G. S. WEGG, DECEASED.

(1 Barn. & Cress. 682—689; S. C. 3 Dowl. & Ry. 112; 1 L. J. K. B. 212.)

Debt on a bond, whereby Sir N. C., G. S. W., and J. W. acknowledged themselves held and bound to the plaintiffs in "1000*l.* each, for which they bound themselves, and each of them for himself for the whole and entire sum of 1,000*l.* each," subject to a condition that G. B. M. should render a true account of all monies received by him as treasurer for the county of Middlesex: Held, that this was a several bond only, and that the obligees, by removing the seal of one obligor, did not render it void as to the others.

DEBT on bond, given by Wegg to the plaintiffs for 1,000*l.* The first plea set out the bond on oyer, which was in the following form: "I George B. Mainwaring am held and firmly bound to, &c. (the plaintiffs) in the sum of 12,000*l.*, for which I

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bind myself, &c.; and I J. E. W. am held and firmly bound in the sum of 3,000*l.*, for which I bind myself, &c.; and we, P. P., S. J., and W. E., are also held and firmly bound in 2,000*l.* each, for which we bind ourselves and each of us for himself, for the whole and entire sum of 2,000*l.* each; and we, Sir N. C., G. S. Wegg (the testator,) and J. W., are also held and firmly bound in 1,000*l.* each, for which we bind ourselves and each of us for himself, for the whole and entire sum of 1,000*l.* each." That plea then set out the condition of the bond, whereby (after reciting that G. B. Mainwaring had been appointed by the plaintiffs (the justices assembled at the quarter sessions) receiver for the county of Middlesex, and it being thought proper by the Court that an adequate security should be given to the county, to the amount of 12,000*l.*; that the obligors in that bond had agreed to become surety for the several sums set to their names respectively,† and not further or otherwise,) the condition was stated to be, that G. B. M. should duly account for *all monies which were then or should thereafter be in his hands as treasurer; and concluded, that the bond was not the deed of Wegg. Second plea, that Sir N. C. sealed and delivered the bond, and afterwards his seal was taken from the bond, without the privity or consent of Wegg or the defendants. Third plea, that the seal of Sir N. C. was taken from the bond with the privity and consent of the plaintiffs. Replication, that before the seal of Sir N. C. was taken from the bond, one F. C. agreed to become surety in his place, and executed a bond to the plaintiffs for 1,000*l.*, conditioned as the one declared on, and thereupon the seal of Sir N. C. was taken from the bond, and that F. C. had since paid the 1,000*l.* Demurrer and joinder.

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Littledale, in support of the demurrer :

The question is, whether the taking away of Sir N. C.'s seal had the effect of rendering the bond void as to Wegg. This was a joint and several bond, as to Sir N. C. Wegg and J. W. After the penal sum are these words: "for which payment we bind 'ourselves' and each of us." They clearly show the obli-

† The sum of 2,000*l.* was set opposite the name of P. P., but no sums were set opposite the other names.

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gation to be joint to the extent of 1,000*l.*, and any one being sued might have contribution from the others. It is not necessary to contend, that, because the obligees might sue each separately for 1,000*l.*, they might sue the three jointly for 3,000*l.*; but, assuming the deficiency in G. B. M.'s accounts to be less than 1,000*l.*, they might sue jointly for that. The subject matter of the security was the entire conduct of G. B. M.; if each had been bound for a different part of his accounts, the bond might have been several; but the interest being joint, the case is distinguishable from **Mills v. Marshall*,† and resembles *Slingsby's* case,‡ upon the principle of which *Anderson v. Martindale*§ and *Southcote v. Hoare*|| were decided. It would certainly be more beneficial to the obligees, to consider this as a joint than as a several bond, for it would save the expense of bringing several actions, and would give them the benefit of a joint execution. Now, as all grants are to be construed most strongly against the grantor, this bond should be so construed as to be most beneficial to the obligees. Then, assuming it to be a joint and several bond, taking off the seal of one obligor avoids it as to all: *Seaton v. Henson*,¶ *Nichols v. Haywood*,†† *Michael v. Stockworth*,‡‡ 2 Roll. Abr. Release (G.), pl. 5. If it be considered a several bond, still the defendants are discharged. Each obligor would have an interest in knowing who were his co-sureties, with a view to contribution, which he would be entitled to, although the bond were several: *Deering v. Winchelsea*.§§ There, too, the parties were bound by several bonds, therefore, *à fortiori*, there must be contribution where all are parties to the same bond. The pleas then are good, and the replication gives no sufficient answer to them, it does not even allege that the new surety was substituted with the privity of the testator.

Rogers, contra :

This bond was several as to each party executing it. There

† Bridg. 63.

‡ 5 Co. Rep. 19.

§ 6 R. R. 334 (1 East, 497).

|| 12 R. R. 600 (3 Taunt. 87).

¶ 2 Lev. 220; S. C. 2 Show. 28

†† Dyer, 59 a.

‡‡ Ow. 8; Cro. Eliz. 120, S. C.

§§ 2 Bos. & P. 270.

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is a material distinction between joint and several bonds and the present. In the former the obligation is joint, although the remedy is *joint or several; but where the duty is several, the bond is several: *Mills v. Marshall*,† *Hemgate's case*,‡ *Anon.*,§ *Shep. Touch.*|| As to some of the obligors, this bond is unquestionably several, and the mere words of plurality, "we bind ourselves," will not make it joint as to the others. In *Mathewson's case*¶ there were similar words of plurality, but the covenants were held several. That case is expressly in point, and has frequently been recognised as good law: *Constable v. Cleobury*,†† *Bayley v. Gaisford*,‡‡ 2 Roll. Abr. Fait, y. pl. 1. The recital too shews that the parties intended this to be a several bond, and that may explain and control the condition: *Pearsall v. Summersett*,§§ *Company of Proprietors of Liverpool Water-works v. Atkinson*,||| *Hassell v. Long*,¶¶ *Payler v. Homersham*.††† It has been argued, that, by removing Sir N. C.'s seal, the defendants' right to contribution has been prejudiced; but in fact it has rather been benefited; for F. C., the new surety, has paid 1,000*l.*, which would reduce the demand against the defendant, and Sir N. C. would still be liable to contribution in equity: *Ship v. Huy*,‡‡‡ *Ex parte Gifford*,§§§ and it is very doubtful whether an action at law for contribution could have been maintained, even if no alteration had been made in the bond: *Cowell v. Edwards*.||||

Littledale, in reply :

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Although Sir N. C. may still be liable in equity, yet the defendant would, by the alteration, be compelled to resort to that Court, and might have much difficulty in shewing that the seal of Sir N. C. had ever been affixed to the bond. Besides, the obligees could not sue him, and would, therefore, in the first instance, be compelled to throw the whole burden upon the

† *Bridg.* 63.

‡ 5 *Co. Rep.* 103 b.

§ *Dyer*, 19 b.

|| 166.

¶ 5 *Co. Rep.* 23.

†† *Poph.* 161.

‡‡ *March*, 125.

§§ 4 *Taunt.* 593.

||| 6 *East*, 507; 2 *Smith*, 654.

¶¶ 2 *M. & S.* 363.

††† 16 *R. R.* 516 (4 *M. & S.* 423).

‡‡‡ 3 *Atk.* 91.

§§§ 6 *R. R.* 53 (6 *Ves.* 805).

|||| 2 *Bos. & P.* 263.

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other obligors. As these difficulties have arisen out of the act of the obligees, they ought to suffer instead of the defendant, who is an innocent party.

BAYLEY, J. :

Where parties enter into a joint and several bond, for payment of an entire sum of money, whatever discharges one of the obligors may discharge them all. But I am satisfied that this was a several, and not a joint and several bond. It would work great injustice to allow the obligees the option of treating it as a joint and several bond. The recital in the condition shews, that each of the parties intended to enter into a security as to a specific limited sum; setting the sum opposite to one of the names, is decisive as to that. But, looking at the obligatory part of the deed, one party is bound in 5,000*l.*, three in 2,000*l.* each, not in one entire sum; then the three, Sir N. C., Wegg, and J. W., in 1,000*l.* each. That, as to the 1,000*l.* parties, is either a several bond, or, to a certain extent, joint. If the former, it binds each one to the payment of 1,000*l.*; but, if joint, then you might sue them all three times over for 1,000*l.*; and if only one were solvent, he would be compelled to pay 3,000*l.*; whereas it is quite manifest that neither of them intended to be bound beyond 1,000*l.* I am, therefore, satisfied that the effect of *the word "each" was to make this a several, and not a joint and several bond. Then, does the removal of the seal of one destroy the bond as to all? That is the argument for the defendant. If it be right, then, in the case of a bond whereby different parties are severally bound in different sums, from 5,000*l.* to 20*l.*, cancelling the bond as to the latter would avoid the bond as to all. If there were any authority for the position, I might feel myself bound by it; but, in the absence of that, we must proceed upon principle. It is said that the right of contribution against Sir N. C. is taken away. If that were so, still, is there any reason for saying that the defendants shall be exonerated from the whole, because they have lost part of their right to contribution? But if the defendants ever would have had a right to contribution from Sir N. C., that right may still be enforced in equity. For

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these reasons I am of opinion, that the facts disclosed in the pleas afford no answer at law to this action, and that the plaintiffs are entitled to recover.

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HOLROYD, J. :

This is not a joint and several bond. The word "each," following the penalty, would, by itself, make it a several bond; and the question is, whether that which follows, viz. "for which we bind ourselves and each of us for himself, for the whole and entire sum of 1,000*l.* each," makes it joint. On the contrary, those words are merely accumulative, and make it more clearly several. The next question is, whether cancelling the bond as to one destroys it altogether. It has been argued that it does, because the obligors are in a worse situation in law than they otherwise would have been. If the parties had been severally bound in one penalty only, there would be force in the *argument. But this is not a bond for the payment of the same sum; each is bound in a different penalty, although to the same amount; and it does not make any one responsible for the penalty of the other. But it is said that the parties have a right to contribution at law. If, indeed, they had all been bound severally in the same penalty, then any one paying would pay that which another was liable to pay, and so benefit him. That would give a remedy at law for contribution. But the remedy at law is founded upon the principle that one pays that to which all are liable, and it goes no further. If, therefore, one obligor be insolvent, contribution for his share cannot be recovered against the others; it is the subject-matter of a proceeding in equity and not at law: *Cowell v. Edwards*. Suppose a judgment in this action be for 1,000*l.*, and the defendants claim for contribution against any other obligor, they will not have paid any penalty to which another was liable, and, therefore, can have no contribution at law. It is true that G. B. M.'s conduct, the subject-matter of the security, was joint; but still the penalties were, at law, the several debt of each. A court of equity might give relief, but none can be had at law. The defendants are not, then, placed in a worse situation by the removal of Sir N. C.'s seal, and, consequently, cannot set up that as a defence to the present action.

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Two points have been urged for the defendants in this case. First, that the bond is joint and several; and, secondly, that whether it be so or not, still the defendants are discharged by the removal of Sir N. C.'s seal. If the bond be several, *Mathewson's* case is decisive of the last point. No case has been referred *to which at all shakes the doctrine there laid down. Contribution by action at law is a modern proceeding, and the introduction of that cannot alter the common law, as to the effect of taking off the seal of one co-obligor in a several bond. But it is very questionable, whether under any circumstances contribution at law could have been had on this bond. The doubt expressed by Lord ELDON in *Cowell v. Edwards* is entitled to great weight. The right to contribution in equity still subsists. If, indeed, the bond were joint and several, the removal of the seal might have avoided it as to all, but in fact it begins as a several bond, and continues so throughout. If it be construed *reddendo singula singulis*, no doubt can be entertained on that point. I therefore agree in thinking, that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

CHARLES JONES v. WILLIAM THORNE.

(1 Barn. & Cress. 715—720; S. C. 3 Dowl. & Ry. 152; 1 L. J.

K. B. 200.)

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Lessee covenanted that he would not do any act, matter, or thing upon the demised premises, which might be, grow, or lead to the damage, annoyance, or disturbance of the lessor, or any of his tenants, or to any part of the neighbourhood; and the proviso for re-entry was, that the lessee should not permit any person to inhabit the premises who should carry on certain specified trades or businesses, (that of a licensed victualler not being one of those,) or any other business that might be, or grow, or lead to be offensive, or any annoyance or disturbance to any of the lessor's tenants: Held, that the opening of a public-house upon the premises was not a breach of the covenant or proviso.

THIS case was sent by the MASTER OF THE ROLLS for the opinion of this Court.

At the time of granting the lease next hereinafter mentioned,

Thomas Postlethwaite was possessed of the premises thereby demised, and of other houses, buildings, and premises adjoining thereto and in the neighbourhood thereof, under a lease thereof, granted to him by Elizabeth Doughty, of Bedford Row; and such several adjoining and neighbouring premises, or the greater part thereof, were occupied by his tenants.

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By lease, of the 1st February, 1806, Postlethwaite demised to the said W. Thorne a piece of ground, situate on the west side of Gray's Inn Lane road, in the county of Middlesex, with the abutments and dimensions therein mentioned, together with a double brick-built messuage, built on the front of the ground towards the east, and which said messuage was described as the third house southward from Guildford Street, habendum from the 24th June then last past, for eighty-six years, at the rent therein mentioned. The lease contained the following covenant and proviso: "That he the said W. Thorne, his executors, &c. should not nor would, during the said term, do, or willingly cause or suffer to be done, any act, matter, or thing whatsoever, in or upon the said demised premises, or any part thereof, which might be, grow, or lead to the damage, annoyance, or disturbance of the said T. Postlethwaite, his executors, &c., or any of his or their tenants, or to any of the tenants of Mrs. *Elizabeth Doughty, her heirs or assigns, in the said parish of St. Pancras, or to any part of the neighbourhood." It also contained the following proviso: "Provided always, that if it should happen that the said yearly rent, or any part thereof, should at any time during that demise happen to be in arrear and unpaid, in part or in all, by the space of fourteen days, or if the said W. Thorne, his executors, administrators, or assigns, should happen to fail or make default in the due performance of all or any of the covenants and agreements thereinbefore contained, on his and their part and behalf to be performed, observed, and kept, or if the said W. Thorne, his executors, administrators, or assigns, should permit or suffer any person or persons to inhabit or dwell in or upon the said demised messuage, buildings, and premises, or any part thereof, who should therein or thereupon use or carry on the trades or businesses of a brewer, bagnio-keeper, distiller, dyer, pipe-burner, melting tallow-chandler, soap-

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boiler, farrier, smith, or iron-founder, or permit or suffer a forge to be erected thereon, or on any part thereof, or suffer the same to be made use of as or for a spunging or lock-up-house or sheriff's office, or lottery office, or any other public office whatsoever, or as or for an auction or sale-room, or broker's shop, or any other trade or business that might be or grow or lead to be offensive, or any annoyance or disturbance to any of the tenants of the said T. Postlethwaite, his executors, administrators, or assigns, or his or their landlady, her heirs or assigns, then in either of the said cases, it should be lawful for Postlethwaite, his executors, &c., to enter and to re-possess the same and expel Thorne." Thorne entered by virtue of the lease into the possession of the demised *premises, and in September, 1821, entered into a written agreement with the plaintiff, Charles Jones, by which, after reciting the above lease, Thorne agreed to grant to Jones a sub-lease of the premises for sixty-two years, subject to the like covenants as in the original lease; and this agreement contained a clause by which Jones was to indemnify and save harmless Thorne from all damages and expenses, in case he, Jones, should open the house as a licensed victualler. A lease of the premises, pursuant to the terms of the agreement, was duly executed by Thorne to Jones, and the said messuage or tenement and premises have been opened by Jones as a public-house, under a licence obtained for the same, previous to the execution of such lease, and the said W. Thorne had full notice thereof before he executed the lease. Upon these facts the question for the opinion of this Court was, whether, by the granting of the said lease by Thorne to Jones, and the opening of the said messuage or tenement as a public-house, or by either of those acts, the covenants and provisos contained in the lease of the 1st February, 1806, from Postlethwaite to Thorne, or any or either of them, had been broken. The case was argued at the sittings after last Easter Term.

Marryat, for the plaintiff :

The covenant and proviso in the lease are broken by the fact of Thorne having suffered Jones to open the house as a public-house. By the terms of the proviso a right of re-entry was

reserved, if the lessee permits any person to inhabit the premises who should carry on certain specified trades, or who should suffer the same to be made use of for a spunging-house, or lock-up-house, or sheriff's office, or lottery-office, or any public office whatsoever, or an auction or sale *room, or a broker's shop. The intention of the parties is clear, that the place should not be made a place of public resort. It then goes on to say, "or any other trade or business that might be or grow, or lead to be offensive, or any annoyance or disturbance to any of the tenants, &c." Now a public-house is a place of public resort, and very likely to grow or lead to be an annoyance or disturbance to the neighbours. The very circumstance of its being placed under the control of the magistrates shews that it is likely to become an annoyance to the neighbours. The lessee covenants not to do anything which might grow or lead to the damage, annoyance, or disturbance of any of the tenants. A public-house would necessarily produce inconvenience to the neighbourhood, by drawing to the spot a large resort of persons; which it was the intention of the parties to prevent. *Doe v. Keeling*† is an authority in point. There the covenant was that the lessee should not exercise upon the premises any trade or business; and it was held, in an ejectment brought for a forfeiture, that the business of a schoolmaster was a trade or business within the meaning of such a covenant, on the ground that it must be an annoyance to the neighbourhood, by the disturbance which the inmates of the house would create, and by drawing to the spot a large resort of persons. Those reasons apply equally to a public-house. Upon the authority of that case the opening of a public-house was a breach both of the covenant and proviso.

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Littledale, contrà :

It is not stated in the case that the public-house in question is an annoyance to the *tenants, or likely to become so. Whether it be so or not must depend mainly on the character and condition of life of those tenants. For a public-house might be a nuisance in one situation and a great convenience in

[*719]

† 14 R. R. 405 (1 M. & S. 95).

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another ; and there is nothing stated in the case from which the Court can collect that the opening of this public-house was any annoyance to the other tenants.

(HOLROYD, J.: The Court is bound to consider this case as they would if the plaintiff had brought an ejectment for the forfeiture, and at the trial had proved only the granting of the lease, and that a public-house had been opened upon the premises.)

By the express terms of the lease the lessee is prevented from using the premises for the purpose of carrying on certain trades therein enumerated, and that of a licensed victualler is not included in the number. It is true, that there are the words "any other trade or business that might grow or lead to be offensive to the tenants." But it is a general rule of construction in all instruments, that where a specific term is used in the first instance, it shall receive no extension by a subsequent general term: *Archbishop of Canterbury's case*;† *Countess of Bridgwater v. The Duke of Bolton*.‡ Applying that rule of construction to the present case, the business of a licensed victualler does not fall within the proviso. If it were held to fall within those words, it would equally extend to the business of a tanner, a slaughter-butcher, a brazier, or a glass-manufacturer, nay, even to that of a common butcher ; for in hot weather his trade might become an annoyance to his neighbours.

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The following Certificate was afterwards sent :

"This case has been argued before us, and we are of opinion, that by the granting the lease by the said William Thorne to Charles Jones, and the opening the said messuage or tenement as a public-house, or by either of those acts, the covenants or provisos contained in the lease have not been broken.

"J. BAYLEY.

"G. S. HOLROYD.

"W. D. BEST."

† 2 Co. Rep. 46.

‡ 6 Mod. 107.

HENRY WARTER AND OTHERS *v.* JOHN
HUTCHINSON AND OTHERS:

(1 Barn. & Cress. 721—751; S. C. 3 Dowl. & Ry. 58.)

1823.
WARTER
v.
HUTCHIN-
SON.

[721]

[THIS was a case sent for the opinion of the King's Bench, upon the same will as the case sent to the Common Pleas reported 23 R. R. 457 (2 Brod. & Bing. 849). The main point as to the estate taken by M. E. M. W. is common to both cases, and the decision of the King's Bench on the point is similar to that of the Common Pleas. The further points decided by the King's Bench were that John R. M. Warter took, on the death of the testator, a vested estate for life; and that Henry Warter took, at the testator's death, a vested estate for life in remainder expectant on the failure of the prior estates.]

K. .B. MICHAELMAS TERM.

1822.
Nov. 9.

[29]

DOE, ON THE DEMISE OF BROOK *v.* BRYDGES.

(2 Dowl. & Ry. 29—30; S. C. 1 L. J. K. B. 9).

Demand of rent due from lessee to lessor, though made of a stranger, if made upon the land, is a sufficient demand to sustain ejectment for a forfeiture for non-payment of rent being lawfully demanded.

EJECTMENT to recover the possession of twelve acres of land. At the trial before Park, J. at the last Assizes for the county of Essex, it was necessary for the lessor of the plaintiff to shew, that a lease which he had before granted of the land in question to a person of the name of Lawrence, the term of which was then unexpired, was forfeited. The lease contained a proviso for re-entry on non-payment of rent. In support of the forfeiture, the lessor of the plaintiff relied upon a demand and non-payment of rent under the following circumstances: The lessor of the plaintiff went upon the land, on the 30th of October, and addressed himself to a person named Warraker, who held under the defendant one of three or four houses built upon the land by the defendant, and said, "I am come to demand of you 5l. for my rent." To this Warraker replied, "that he had paid his rent to Mr. Brydges, the defendant, and he did not understand paying any more." A similar demand was made upon the other occupants of the houses upon the land, being tenants of the defendant, but without success. It was objected, that this was not a sufficient demand to sustain a forfeiture, and that the demand should have been general, and not of strangers, whom, for this purpose, the defendant's tenants must be considered. The learned Judge, however, overruled the objection, and held the demand to be sufficient, having been made upon the land.

Walford now moved for a rule to shew cause why the verdict should not be set aside and a new trial granted, and contended that there was no sufficient demand of the rent proved, to sustain a forfeiture; and, relying on the authority of *Sweton*

v. *Cushe*,† he insisted that the demand ought to *have been general, and not of a stranger, inasmuch as it must appear that the person of whom the demand is made, is one having authority to pay the rent. The defendant's tenants were *quoad* the lessor of the plaintiff, perfect strangers, and therefore a demand of them was not sufficient to work a strict forfeiture.

DOE
v.
BRIDGES.
[*30]

ABBOTT, Ch. J. :

I have no doubt that, upon special verdict, this might be considered as sufficient evidence of a demand of rent upon the premises. It is perfectly clear that if there is no other person upon the land to pay the rent, such a demand as this would, upon all the authorities, be sufficient to sustain an ejectment for a forfeiture. The case of *Sweton v. Cushe* was argued upon special verdict, and may stand good. That was the case of warning to effect repairs of a house pursuant to the covenant of a lease, and it was held, that warning to a man who was not the tenant was not sufficient. I do not say that the evidence in this case would have warranted us in saying that this would have been sufficient warning to the immediate tenant of the lessor ; but here the demand of rent is made upon the land, and though it is argued that the demand is made upon persons who are strangers to the lessor, still I think that is sufficient.

The rest of the Court concurred.

Rule refused.

† Yelv. 36.

K. B. HILARY TERM.

1823.
Jan. 23.

WAYDE v. LADY CARR.

(2 Dowl. & Ry. 255—256; S. C. 1 L. J. K. B. 63.)

[255]

In case, for negligent driving, the law or usage of the road is not the sole criterion of negligence. Therefore where defendant's carriage was on the wrong side of the road, and in attempting to pass on the near instead of the off side, plaintiff sustained damage: Held, that it was for the jury to decide the question of negligence on all the circumstances of the case.

CASE for the negligence of the defendant's servant, in driving her carriage against a gig of the plaintiff, whereby he was thrown out and injured in his person. Plea, Not guilty, and issue thereon. At the trial before Abbott, Ch. J. at the Middlesex adjourned sittings after last Term, the jury found their verdict for the defendant.

Gurney now moved for a rule to shew cause why the verdict should not be set aside and a new trial granted, and he relied upon the fact proved in evidence, that at the time of the accident the defendant's carriage was on the wrong side of the road, and that the coachman had attempted to pass a hackney coach which interposed between his mistress's carriage and the plaintiff's gig, on the near instead of the off side, contrary to the universal law and usage of the road, whereby the alleged injury was sustained by the plaintiff.

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The Court, however, said, that whatever might be the law of the road, it was not to be considered as inflexible and imperatively governing a case of this description. In the crowded streets of a metropolis, where this accident happened, situations and circumstances might frequently arise where a deviation from what is called the law of the road would not only be justifiable but absolutely necessary. The question in this case was a question of negligence. Of this the jury were the best judges, and independently of the law of the road, it was their province to determine whether the accident arose from the negligence of the defendant's servant. They had acquitted

him of negligence, and having all the circumstances of the case before them, had found their verdict for the defendant; and therefore there was no ground for this application.

WAYDE
v.
LADY CARR.

Rule refused.

YARWORTH v. MITCHEL.†

(2 Dowl. & Ry. 423—424; S. C. 1 L. J. K. B. 112.)

An infant who sues by his next friend need not give security for costs, even though the next friend is sworn to be insolvent.

1823.
Feb. 10.
[423]

THIS was a rule calling upon the plaintiff, an infant, who sued by his father, as *prochein amy*, to shew cause why the proceedings in the action should not be stayed, until he gave security for costs, on an affidavit, stating that the *prochein amy* was insolvent, and in no condition to pay costs, and that he had admitted in a conversation with the deponent, that he had nothing to do with the costs, but that a friend would see him righted.

Walford shewed cause, and said that the question in this case was in effect, whether under any circumstances an infant plaintiff could be called upon to give security for costs. He maintained that he could not, and cited an anonymous case in C. P.‡ where it had been expressly held, that the Court would not oblige an infant plaintiff to give security for costs.

Chitty, contra, relied upon *Doe d. Selby v. Alston*,§ where BULLER, J. said, "There are only three instances in which the Court will interfere on behalf of a defendant to oblige the plaintiff to give security for costs: the first is, when an infant sues, the Court will oblige his *prochein amy*, or guardian or attorney, to give security for the costs; second, when the plaintiff resides abroad, in which case the Court will stay proceedings till security is given for costs; and third, where there has been a former ejectment."

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† Same principle acted on by N. S. Ch. 204.—R. C.
the Court of Chancery in *Fellows* † 1 Marsh. 4.
v. Barrett (1836) 1 Keen. 119, 5 L. J. § 1 T. R. 491.

YARWORTH
v.
MITCHEL. Per CURIAM :

We shall act upon the last decision in the Common Pleas. If we were to hold that the *prochein amy*, who in this case happens to be the father of the infant, must give security for costs, it would in many instances absolutely prevent an infant from suing, however just his cause of action might be.

Rule discharged, without costs.†

† Vide 2 Tidd. 61.

THE KING *v.* SMITH.

(1 L. J. K. B. 31—32.)

1822.
Nov. 23.

[31]

The Court of King's Bench will grant a criminal information against a person who abuses a public officer for the manner of discharging his duty.

BROUGHAM, on a former day, obtained a rule *nisi*, calling on one William Smith to shew cause why a criminal information should not be filed against him. The application was made in behalf of Mr. Thomas Briggs, before whom a plaint had been heard, in which Mr. Smith was the defendant. The verdict passed against him. The affidavits then stated that Mr. Smith, after collecting a crowd together, exclaimed, "County court, county court, the grand sheriff of the county of Cumberland tries causes unjustly in his Court. I have not had a fair trial:" and made use of several opprobrious epithets.

Brougham now moved to make the *rule absolute, as no cause was shewn to the contrary.

[*32]

BY THE COURT :

It is the duty of this Court to protect public officers from insult, whilst in the discharge of their important duties. Let the

Rule be absolute.

EX PARTE RADFORD, A SHERIFF'S OFFICER.

(1 L. J. K. B. 33.)

1822.
Nov. 25.

[33]

The Court will interfere in a summary manner to punish a sheriff's officer for extortion, by directing him to pay back the money, and ordering him to be fined, and imprisoned until the money is paid.

HENRY COOPER had obtained a rule *nisi*, at the instance of Mr. Wood, calling on Radford to refund certain sums of money paid to him by Wood, whilst confined in his lock-up house.

The Master, to whom the matter was referred, read his report. He stated that the officer had received 21*l.* 18*s.* 6*d.* more than he was allowed by law, and that during the investiga-

Ex parte
RADFORD.

tion, Radford had pursued a line of conduct calculated to deceive him.

By THE COURT :

There is a power given to us, not only to order the money to be restored, but to punish the offender. Let the officer pay back the sum of 21*l.* 18*s.* 6*d.* and the costs of this application : and further that he pay a fine of 25*l.* to the King, and that he be committed to the custody of the marshal until those two sums of money are paid.

1822.
Nov. 22.

EX PARTE THE MAYOR AND ALDERMEN OF THE
BOROUGH OF STAFFORD.

(1 L. J. K. B. 41.)

[41]

A *mandamus* lies to compel a mayor and corporation to allow the burgesses, at all seasonable times, to inspect all the charters and grants made to the borough.

PEARSON shewed cause against a rule obtained by *Taunton*, calling on the mayor and corporation of the Borough of Stafford, to shew cause why a *mandamus* should not be sent to them, commanding them to shew to the burgesses of that borough, their charters, grants, records, books, and proceedings, which relate to the right of the burgesses to elect members to Parliament.

It appeared, that a notice had been given by Mr. Flint, the attorney for the burgesses, to the mayor and aldermen, that the burgesses desired to inspect the public papers of the corporation, and to take copies of them, which was not attended to ; because the corporation conceived that they were not bound to shew the proceedings that did not concern the burgesses ; and then a second notice was served, upon which the rule for a *mandamus* was obtained.

Pearson said the corporation were very willing to allow the burgesses to inspect all documents concerning the election of members of Parliament, although they objected to shew all their papers.

W. E. Taunton said they should be contented with such permission.

Ex parte
THE MAYOR
OF STAFFORD.

BAYLEY, J. :

The freemen of the borough have an undoubted right, at all seasonable times, to have access to inspect and read all the charters and grants made to the borough. But as you are agreed as to what you wish to inspect, let a *mandamus* issue confined to those particular documents.

Mandamus ordered.

THE KING *v.* JAMES SHEPARD.

(1 L. J. K. B. 45—46.)

1822.
Nov. 23.

[45]

An encroachment on the banks of a navigable river is not necessarily a nuisance; but the jury ought, on the facts of the case, to say whether the public are in any way inconvenienced; for if they are not, then it is not a nuisance.

AN indictment had been found against the defendant at the Michaelmas Sessions for the borough of Newport, in the Isle of Wight, 1821. It stated that the river Medina, or Newport river, was an ancient navigable river for all the King's liege subjects, to pass and repass with vessels at their free will and pleasure; that it was within the borough of Newport; that the defendants erected and placed a certain building of brick, mortar, timber, &c., of the length of 30 feet, and of the width of 10 feet, and an embankment of wood, gravel, stones, &c., of the length of 100 feet along the side of the said river, or common King's highway, parallel with the banks of it, and of the width of 80 feet, projecting into the stream; and that the defendant the same did unlawfully continue, to the great damage and common nuisance of all the King's liege subjects, &c.

On the trial before Park, J. at the Assizes at Winchester in July, 1822, much contradictory evidence was given, as to whether the river had become less navigable in consequence of the embankment. Upon the case of *Rex v. Lord Grosvenor* and others† being mentioned as an authority to prove that every encroach-

† 20 R. B. 732 (2 Stark. 511).

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SHEPARD.

ment on a navigable river, although you leave a space sufficient for the purposes of navigation, is necessarily a nuisance, the learned judge directed the jury to find the defendant guilty.

[*46]

P. Williams had obtained a rule *nisi* for a new trial, and was now called on to support it. He contended that *Rex v. Lord *Grosvenor* was misquoted at the trial, and that the case went merely to decide that the question—of nuisance or not nuisance—was a fact for the jury to consider on the evidence, whether the public had or had not been inconvenienced by the thing complained of. He mentioned the case of *Grant v. Gunnert*† and read the definition of a purpresture from Glanville, and contended, that using the banks of a river did not necessarily make a nuisance, or persons could not place timber on the sides of the Thames; and that inasmuch as it had not been left to the jury as a matter of fact, whether or not any inconvenience to the public had been produced by the embankment, the defendant ought to have a new trial.

BY THE COURT:

If persons, who wish to make embankments on the sides of navigable rivers, will not take the legitimate course of proceeding, by means of an inquiry before the sheriff, to ascertain whether the change will operate to the prejudice of the public, the Court will not afterwards assist them; but the question of convenience or inconvenience ought certainly to have been left to the jury. It appears that a portion of the public rights has been abridged, but it is very minute; and the public inconvenience, if any, is exceedingly small. It is possible that the alteration may have produced a favourable effect in the navigation of the river; but that is for the jury to say, and it is therefore right that there should be another trial.

Rule absolute, on payment of costs.

† 10 R. R. 562 (1 Taunt. 435).

GORDON AND OTHERS *v.* HARE.

(1 L. J. K. B. 70—71.)

1823.
Jan. 28.

[70]

The relation between the owner and commander of a vessel, as to the ordering and payment of necessaries and repairs, is exactly the same as between a master and servant generally; and, consequently, the presumption of an implied authority of the commander to order repairs to be done on the credit of the owner may be repudiated by circumstances, as where the commander* promises to pay ready cash, and no mention is made of the owner's responsibility.

[*71]

DECLARATION, assumpsit for goods sold and delivered,—and work and labour done—with the common money counts. Plea, Non assumpsit.

At the trial before the Lord Chief Justice, in the Guildhall, London, it appeared that the plaintiffs were wholesale iron-mongers; that the defendant was the mortgagee in possession of the ship *Matilda*, and in March, 1821, was registered as her owner; that the action was principally brought to recover the value of a capstan furnished, in April, 1821, by the plaintiffs, to the ship, by the order of Captain Drake, to whom the vessel had under conditions been sold, and who, at the time the capstan was ordered, was master of the *Matilda*; that Captain Drake becoming embarrassed in his affairs, the defendant again took possession of the vessel with the capstan, in July, 1821, and gave the command of it to another captain; that letters from the defendant were read to shew that he had often acted as owner;—that it was well known, particularly at the Jerusalem Coffee-house, that Captain Drake had purchased the ship, and that when he ordered any thing for the outfit of her he never mentioned the name of the defendant, but bought it on his own credit; that he agreed to pay for the capstan in ready money; and that the plaintiffs had often inquired after Captain Drake for the money, and had requested payment of it from him; and that, on 2nd July, they wrote to Captain Drake saying, “We must request you will immediately settle the account, or we shall be obliged to take unpleasant steps in the business. The amount of our bill is 118*l.* 17*s.* 7*d.*, agreed to be paid for in cash as soon as the work was executed.”

It was objected on the part of the defendant, that he being

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only mortgagee in possession, was not liable to repairs; and also, that when the owner rates the ship over to the master, there is only an implied liability on him to pay for any thing that the master may have ordered; and that in this case that presumption had been destroyed, by shewing that the order was expressly on the credit of the master, particularly as it was for cash; and the learned CHIEF JUSTICE directed a nonsuit.

The *Solicitor-General* moved to set aside the nonsuit, and to appoint a new trial, on the ground that the defendant being the registered owner, was *primâ facie* liable to pay for the capstan, and that the master being merely his agent to outfit the vessel, was not the person responsible for the payment.

BY THE COURT :

It is not necessary in this instance to inquire minutely into the law, as it respects the liability of a mortgagee in possession of a ship to pay for necessary repairs done to her. Even supposing that the defendant was the actual owner of this vessel in April, 1821, yet this is a clear case of credit to the master. The legal relation between the owner and commander of a merchant vessel is exactly that of master and servant, and generally, if the master permits the servant to purchase goods for him, he will be liable to pay for things ordered by that servant, although they may never have come to his possession. But that implied authority may be rebutted by evidence, that the master always provided the servant with money. So in this case the general rule ceases to operate, for no servant could have dealt for ready cash on the credit of his master,—no person who expected the master to pay would have written to his servant the letter read in evidence; and, moreover, it was shewn to be the general rule in East India voyages to give credit to the commander.

Rule refused.

C. P. TRINITY TERM.

HUNT v. BELL.†

(1 Bing. 1—5; S. C. 7 Moore, 12.)

1822.
June 8.

[1]

In an action for libelling the plaintiff in his vocation as an exhibitor of sparring matches, the jury were directed to consider whether the plaintiff's exhibitions were not illegal, as tending to form prize-fighters, the Judge declaring such to be his opinion, but recommending the jury to find a verdict for the plaintiff, in order that the question might be fully discussed on a motion to set aside such verdict; a verdict having been found for the defendant, the Court refused to grant a new trial.

Semle, that public exhibitions of sparring matches are illegal.

A party who pursues an illegal vocation has no remedy by action for a libel regarding his conduct in such vocation.

THIS was an action on the case, for a libel against the plaintiff, in regard to his conduct as proprietor of a building called the Tennis Court, which, the declaration stated, he had himself appropriated, and had permitted others (for money therefor paid to him) to appropriate for (amongst other lawful purposes) the *exhibiting from time to time therein of sportive and amicable contests, or matches, in the art of pugilism, or boxing, with padded gloves, commonly called sparring, by and between persons skilled in such art, for the amusement of any persons desirous of being spectators thereof, and paying for their admission into such building a certain sum of money per head.

[*2]

The general issue was pleaded. At the trial before Dallas, Ch. J., Middlesex sittings after Easter Term last, the above statement as to the nature of the exhibitions at the Tennis Court was fully made out, and also, that those exhibitions, consisting of sparring, chiefly by professors of pugilistic science, had always been conducted in the most orderly manner. There was no evidence that they were designed as a training or preparation for regular prize-fighting. The publication of the matter complained of was admitted by the defendant, and it appeared to be clearly libellous; but the defence was, that the purpose to which the plaintiff had appropriated the Tennis Court was

† Referred to in judgment of the L. R. 2 Ex. 327, 330, 36 L. J. Ex. Court in *Foulger v. Newcomb* (1867) 169, 171.—R. C.

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illegal, as being, if not an absolute training for, preparatory to and promotive of, regular prize-fighting: and the preamble of the statute 25 Geo. II. c. 36, s. 2, was referred to, as indicative of the views entertained by the legislature on such matters.

DALLAS, Ch. J., first put it to the jury to consider, whether the plaintiff's exhibitions were not illegal, as tending to form prize-fighters, declaring such to be his opinion at the moment, although he was unwilling to decide the point without further time for deliberation, and he then recommended the jury to find a verdict for the plaintiff, which the defendant might afterwards move to set aside, and so, fully discuss the question: but the jury found a verdict for the defendant. Whereupon

[3]

Bosanquet, Serjt. now moved for a new trial, on the following grounds:

The verdict was given under the supposition that the plaintiff's vocation was illegal; but there was no evidence that his exhibitions were designed as a training or preparation for regular prize-fighting; and a mere exercise of pugilistic skill, divested of violence by the use of padded gloves, is not illegal, such exercise being not only unaccompanied with breach of the peace or danger, but being highly beneficial as promotive of bodily strength and agility, and as furnishing means of defence against unprovoked attacks. Prize-fighting has always been interrupted and repressed by the magistrates, but they have never interfered to prevent exhibitions of sparring, as they must have done if such exhibitions had been unlawful; and this is the first time the legality of them has been questioned. If it be unlawful in the way of exhibition, or otherwise, to give and receive instruction in the art of pugilistic attack and defence, those instructions being unaccompanied with violence or danger, except from accidents, which might equally occur in tennis, cricket, or other games, *à fortiori* must all instruction or practice in fencing, broad-sword exercise, or archery, be illegal; yet exhibitions of, and practice in the two former, have never been interrupted, though publicly carried on. There are numerous enactments

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for the encouragement of archery ; and in *Rex v. Handy* † Lord KENYON must be taken to have spoken of fencing as not illegal. The price demanded for admission would prevent exhibitions of this kind from occasioning idleness in the poorer classes of society ; though, if it were otherwise, Lord Coke says, † “ When King Edw. III., in the 39th year of his reign, commanded the exercise of archery and artillery, and prohibited the exercise of casting stones and bars, and *the hand and foot-balls, cock-fighting, *et alios vanos ludos*, yet no effect thereof followed till divers of them were prohibited upon a penalty by divers Acts of Parliament.” But there is no Act of Parliament which forbids sparring exhibitions, and they do not fall even within the preamble of 25 Geo. II. c. 36, s. 2. Stage representations they cannot be called, with more propriety than the feats of tumblers, which latter have been holden not to be stage representations within that Act: *Rex v. Handy*.

[*4]

DALLAS, Ch. J. :

When this cause was tried, I certainly delivered an opinion, such as I could form at the moment, and under some difficulty ; for I think there *may* be difficulty in this question, and I have wished for further time to consider it. Without going into matters foreign to the point under discussion, we know that, in the early periods of their history, it has been the practice of all civilized nations to train up their population to exercises of activity and courage ; and, with a view to national defence, to promote emulation in amicable contests of strength. I stated to the jury the difficulty of distinguishing between fencing and boxing. Many persons, now present, can recollect the exhibitions of skill by Angelo, Roland, St. George, and others ; and yet, is not fencing the art of attack, as well as of defence, and is it not more dangerous than boxing ? But is fencing illegal ? or is it illegal to attend a fencing school ? is it illegal to practise the bow and arrow ? Are archery meetings illegal ? On all these views of the subject, I felt considerable difficulty. But, on the whole, when I consider that these sparring exhibitions are conducted by professors of pugilism ; that they are meetings which

† 6 T. R. 286.

† 11 Co. Rep. 87, case of Monopolies.

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may tend to encourage an illegal vocation, and to form prize-fighters, I see no reason for disturbing the present verdict.

[5] PARK, J. :

If it were necessary for us to decide, whether exhibitions, such as those in which the plaintiff was engaged, are illegal, I should wish for more time before I came to a conclusion, because exercises of such a kind have long existed. The argument drawn from the supposed legality of fencing exhibitions, would be stronger in favour of sparring exhibitions, if persons who learned fencing were trained to prize-fighting, as pugilists notoriously are ; but such is not the case : and it having been put to the jury, whether the plaintiff's exhibitions did not tend to form prize-fighters, I see no reason for disturbing the verdict.

BURROUGH, J. :

I am of opinion, that the practice in question is illegal. The chief object for which persons attend these exhibitions is to see and judge of the comparative strength and skill of parties, who may be afterwards matched as prize-fighters, and that, frequently, to the loss of life ; for there can be no doubt that the skill acquired in these schools enables the combatants to destroy life, in some instances, by a single blow ; and it is notorious that persons assembled at these exhibitions engage in illegal bets on the issue of such encounters.

RICHARDSON, J. :

If the question were merely, whether it is lawful or unlawful for persons to learn the art of self-defence, whether with artificial weapons, or such only as nature affords, there can be no doubt that the pursuit of such an object is lawful ; but public prize-fighting is unlawful, and any thing which tends to train up persons for such a practice, or to promote the pursuit of it, must also be unlawful. The jury have found that the exhibitions in question have such a tendency, and I see no reason for disturbing their verdict.

Rule refused.

JACKSON *v.* LOWE AND LYNAM.†

(1 Bing. 9—13; S. C. 7 Moore, 219.)

1822.
June 11.

[9]

The purchaser of 100 sacks of good English seconds flour, at 45s. a sack, wrote to the vendors as follows: "I hereby give you notice, that the corn you delivered to me in part performance of my contract with you for 100 sacks of good English seconds flour, at 45s. per sack, is of so bad a quality that I cannot sell it, or make it into saleable bread. The sacks of flour are at my shop, and you will send for them, otherwise I shall commence an action." To which the vendors answered by their attorney, "Messrs. L. and L. consider they have performed their contract with you as far as it has gone, and are ready to complete the remainder; and unless the flour is paid for at the expiration of one month, proceedings will be taken for the amount."

Held, that a jury was warranted in concluding that the contract mentioned in the vendors' answer, was the same as that particularised in the purchaser's letter, and that, therefore, the two writings constituted a sufficient memorandum of the contract under the statute.

THIS action was brought to recover damages for the non-performance of a contract for the sale and delivery of 100 sacks of good English seconds flour, at 45s. a sack. At the trial before Garrow, B., Stafford Lent Assizes, 1822, were given in evidence the two following documents: first a notice from the plaintiff to the defendants,

"To Messrs. Joseph Lowe and George Lynam, of Stoke upon Trent, in the county of Stafford, millers.

"I, the undersigned, Samuel Jackson of Hanley, in the county of Stafford, grocer and flour dealer, do hereby give you notice, (as I have frequently done,) that the flour you caused to be delivered to me on Wednesday and Thursday last, (in part performance of my contract with you, for 100 sacks or bags of good English seconds flour, at 45s. per sack or bag, the whole of which were to have been delivered as on Thursday last,) is of so bad a quality, that I cannot either sell it as flour, or *make it into saleable bread, as will appear by the samples of the flour and bread left at the office of Mr. Adams, attorney-at-law, in Newcastle under Lyne. I further give you notice, that the same bags or sacks of flour (with the exception only of the samples

[*10]

† For more recent cases on similar point, see *Buxton v. Rust* (Ex. Ch. 1872) L. R. 7 Ex. 279, 41 L. J. Ex. 173; *Long v. Millar* (1879) 4 C. P. Div. 450, 46 L. J. C. P. 596;

Shardlow v. Cotterell (1881) 20 Ch. Div. 90, 51 L. J. Ch. 353; *Craig v. Elliott*, (1885) 15 L. R. Ir. 257; *Oliver v. Hunting* (1890) 44 Ch. D. 205.—R. O.

JACKSON
v.
LOWE

above alluded to,) are at my shop, and at your risk ; you will, therefore, immediately on receiving this notice send for them away, otherwise I shall commence an action against you for trespass. And I lastly give you notice, that I not only hold you answerable, and expect you to fulfil your part of the contract above alluded to, in the course of this present week, but in addition thereto, make me ample remuneration for the loss I have sustained in consequence of your neglect, as I have always been, and still am ready to fulfil my part of the contract. Given under my hand this 24th day of September, 1821.

“SAMUEL JACKSON.”

Next, the answer to the foregoing, written at the desire and under the instructions of the defendants, by their attorney's clerk.

“STOKE, 27th September, 1821.

“SIR,

“I have your letter or notice of the 24th September, directed to Messrs. Lowe and Lynam, now before me ; in reply to which, I have to state that Messrs. L. and L. consider they have performed their contract with you, as far as it has gone, and are ready to complete the remainder ; and I have also to inform you, that unless the flour is paid for at the expiration of one month from the 20th instant, proceedings will be taken against you for the recovery of the amount without any further notice.

“I am, Sir,

“Yours obediently,

“WM. WILLIAMS.

“To Mr. S. JACKSON, Baker, Hanley.”

[11]

Sixteen sacks of flour, it appeared, had actually been delivered ; but it being disputed whether or no there had been on the part of the plaintiff, such an acceptance of them as would render unnecessary a note or memorandum of the contract under the 17th section of the Statute of Frauds, it was contended for the plaintiff, and denied for the defendant, that the above notice and the answer to it, taken together, constituted a sufficient

memorandum of the contract under the provisions of that statute. A verdict having been found for the plaintiff,

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v.
LOWE.

Bosanquet, Serjt., in the last Term, moved for a rule *nisi* for setting aside this verdict and entering a nonsuit, or for a new trial, on the ground, that though two distinct writings might be coupled so as to make a memorandum of contract, the above notice and answer to it did not, taken together, constitute a sufficient memorandum of the contract under the Statute of Frauds; he contended, that the plaintiff's notice being framed with the expression, "*my contract*," and the defendants' answer with the expression, "*their contract*;" instead of *the contract*, or *the contract in your notice*, there was nothing from which the jury in the absence of further evidence, were warranted to infer that the contract mentioned in the answer was the same as the contract mentioned in the notice. The defendants would not have been prevented (by any thing which their answer contained) from shewing that the contract which they had there in view, was different from the contract described in the plaintiff's notice. If they could have shown that, there was no memorandum authenticated by both parties, of the contract on which the plaintiff had declared.

A rule *nisi* having been granted,

Pell, Serjt. now shewed cause against, and *Bosanquet*

[12]

PARK, J.† :

In this case, I think there was a sufficient note in writing of the contract on which the plaintiff sued. It is admitted, that two distinct writings may be coupled together and constitute a memorandum within the intention of the statute, and there are decisions to this effect: *Saunderson v. Jackson*,‡ *Schneider v. Norris*.§ The question therefore is, whether the jury were not warranted in concluding, there was in this case a sufficient note in writing. The writing must clearly refer to the contract,

† Dallas, Ch. J. absent, being ill.

§ 15 R. R. 250 (2 M. & S. 286).

‡ 5 R. R. 580 (2 Bos. & P. 238).

JACKSON
v.
LOWE.

which is the ground of action ; but how can there be a clearer reference than in the defendants' letter ? The notice contains an assertion of the contract, specifying the quantity, quality, and price of the flour, and to this contract the answer most clearly refers, disputing none of the terms, of it, nor mentioning any other terms, but asserting a part performance.

BURROUGH, J. :

It is quite impossible for the most scrupulous man to doubt that on these two papers there is sufficient evidence in writing of the defendants' contract.

RICHARDSON, J. :

[*13] I think these two papers were a sufficient memorandum or note in writing of the defendants' contract, according to the provisions of the Statute of Frauds. The plaintiff in his notice states the terms of the contract, and the defendant by his answer recognizes them sufficiently to warrant the jury in concluding, that both parties had the same contract in view. *It is admitted, that if the defendants had written, " they have performed the contract mentioned in your notice," it would have been sufficient ; but the jury have found, and I think satisfactorily, that this was the contract referred to ; *Saunderson v. Jackson* is in point, and the rule must be

Discharged.

HOPKINSON *v.* SMITH.

(1 Bing. 13—17; S. C. 7 Moore, 237.)

1822.

June 11.

[13]

An attorney cannot recover a charge for conducting a suit in which the party charged has not had the benefit of the attorney's judgment and superintendence. Therefore, where, in an action on an attorney's bill, it appeared that the plaintiff lived at D., five miles from W., that the defendant lived at H., fourteen miles from W., and applied to J. B. (who resided at W., and who had been a clerk of the plaintiff's, and practised in his name) to carry on the suit for which the bill in question was incurred; J. B. carried on the suit, and it did not appear that the defendant ever saw the plaintiff, or had the benefit of his judgment; the business done at the office at W. was for J. B.'s benefit, except one-third, which the plaintiff received for coming over once a-week to shew his face; plaintiff's name was not on the door at W., nor was it employed by J. B. in soliciting business; but J. B. frequently consulted with plaintiff; drafts were sometimes engrossed at D. for the office at W.; the draft of the brief in the suit which J. B. had carried on for defendant, was in the hand-writing of plaintiff, as well as some items in J. B.'s books touching that suit; the defendant, when applied to, admitted the sum claimed, but required to set off a sum due to him from J. B., which was refused:

Held, that a nonsuit, directed by the Judge who tried the cause, was proper.

THIS was an action by the plaintiff, an attorney, to recover the amount of his bill, for business done for the defendant, in a suit by the defendant against one Naylor. At the York Spring Assizes, 1822, before Bayley, J.; the case appeared to be as follows. The plaintiff resided at Dewsbury in Yorkshire, five miles from Wakefield. The defendant lived at Huddersfield, fourteen miles from Wakefield, and applied to John Berry, (who resided at Wakefield, and who had been a clerk of the plaintiff's, and practised in his name, but was not an attorney,) to commence the suit against *Naylor. Berry then carried on the suit, and it did not appear that the defendant was ever seen with the plaintiff, or had the benefit of the plaintiff's judgment in the management of the business.

[*14]

The business done at the Wakefield office by Berry, was for Berry's benefit, except one-third which the plaintiff was to have as a remuneration for his loss of time, in coming over once a week to shew his face. In soliciting for business, his name was seldom or never introduced, nor did it appear on the door of the office at Wakefield, but Berry frequently consulted with the

HOPKINSON
v.
SMITH.

plaintiff; drafts were sometimes engrossed at Dewsbury for the office at Wakefield; the draft of the brief in the defendant's action against Naylor, was in the plaintiff's hand-writing, and had been settled by him, and some of the entries in Berry's books respecting the items in the defendant's suit against Naylor, were in the plaintiff's hand-writing. When the bill, for which the present action was brought, was delivered to the defendant, he admitted that the sum was due; but complained that it was a hard case, as he had a bill against Berry for spirits, and should expect the amount to be deducted. This was refused by the plaintiff.

Upon these facts the learned Judge directed the plaintiff to be nonsuited, on the ground, that no retainer of the plaintiff was proved; that before a party could be called on to pay an attorney's bill, he ought to have had the benefit of an attorney's judgment, which the defendant in this case had never obtained; and that if the transactions between Berry and the plaintiff amounted to a partnership, the action should have been brought in both their names.

[*15]

Hullock, Serjt. moved for a new trial, contending, that the proof of a retainer was rendered unnecessary, by the defendant's having admitted the amount claimed *to be due; that it was allowable and usual for attorneys to station clerks at a distance for the purpose of taking instructions, and that it appeared, that the defendant had in this case, had the benefit of the plaintiff's judgment, the brief having been proved to be in his hand-writing. As to the supposition of a partnership between Berry and the plaintiff, a per centage on the amount of business procured, would not of itself constitute a partnership, inasmuch as it had been decided, that the paying an agent by a proportion of the profits of an adventure, did not amount to a partnership. *Meyer v. Sharp*. †

A rule *nisi* having been granted,

Vaughan, Serjt., who shewed cause against it, in addition to the reasons for the nonsuit given by the learned Judge at the

† 5 Taunt. 74.

trial, pointed out the injustice of depriving the defendant of his set-off against Berry, when there had been no communication or privity of contract between him and the plaintiff.

HOPKINSON
v.
SMITH.

Hullock was heard in support of his rule.

PARK, J. † :

It is clear on principles of public policy, that this nonsuit ought not to be set aside, because, from the earliest times since parties have been allowed to appear by attorney, there has been great anxiety on the part of the legislature, to keep that branch of the profession pure, and the Judges are entitled to see when a charge is made for the assistance of an attorney, that such assistance has been *bonâ fide* given. Here, the defendant, knowing nothing of the plaintiff, (who was only to shew his face occasionally,) applied to Berry, who was indebted to him for a quantity of spirits ; and Berry *might have been selected to perform the defendant's business, with the decided intention, that the debt due from him should be set off against the charge for such business. I do not say it would not be a sufficient exercise of the business of an attorney, if in a place where he carries on his business, or where he may have two offices, he should sometimes refer his clients to a clerk, because, in such a case, the constant opportunity of conference with the clerk, enables the client to have the benefit of the attorney's judgment ; but the circumstances are very different here, and Berry acted altogether without assistance. Since the trial of this case, another similar in its circumstances has been tried at Lancaster before Mr. Justice HOLROYD, who decided in the same way as Mr. Justice BAYLEY.

[*16]

BURROUGH, J. :

Independently of the general question, on the facts of this case it is clear the plaintiff cannot maintain his action. But the general question is of great importance ; we are bound to admit attorneys, to examine them, to punish, and to regulate their conduct in regard to their clients ; but what control can we have

† Dallas, Ch. J. absent, being ill.

HOPKINSON
v.
SMITH.

over the attorney, where the client has no communication with him. The present is not the case of an attorney who superintends another business at a little distance from his own office, but of one who seldom appeared, who never gave the benefit of his judgment in this case, and who paid the clerk, not a salary, but a proportion of the profits of the business.

RICHARDSON, J. :

[*17] On the facts of this case, independently of any rule of law, this nonsuit ought to stand ; because Berry's participation in the profits seems to amount to a partnership, and Hopkinson, probably, sued alone, because such a partnership was illegal. But the charge he makes against the defendant is illegal on *general grounds : it is the business of an attorney to instruct his clerk, in order to render him competent to pursue his profession ; but here the attorney lived in a distant town ; the clerk was without instruction, and the client without the benefit of the attorney's judgment.

Rule discharged.

1822.
June 14.

WHITE v. ROYAL EXCHANGE ASSURANCE. †

(1 Bing. 20—21 ; S. C. 7 Moore, 249.)

[20]

Held, that where the plaintiff's attorney was indebted to the plaintiff in a sum greater than the attorney's costs in the cause, the agent (to whom the plaintiff's attorney was indebted on a general account in a sum greater than the amount of the attorney's costs) could not, as against the plaintiff, retain out of the sum recovered by the plaintiff more than the charge for agency in that particular cause.

[*21]

LENS, Serjt., upon an affidavit that the plaintiff's attorney was indebted on bond to the plaintiff in a sum greater than the amount of the attorney's taxed costs in this action, moved that the damages and costs in this action should be paid over to the plaintiff's executors, or their attorney, the plaintiff being dead. It appeared that the plaintiff's attorney was also indebted upon a general account to his agent, to an amount greater than the sum which would have been payable to the *plaintiff's attorney as his costs in this cause, and that the agent therefore insisted on retaining, out of the sum payable to the plaintiff from the defen-

† *Lawrence v. Fletcher* (1879) 12 Ch. D. 858.

dants, not merely his charge for agency in the particular cause, but a sum equivalent to what would have been the attorney's costs. *Lens* insisted that the agent had no lien as against the plaintiff, except for his agency in the particular cause.

WHITE
v.
ROYAL EX-
CHANGE AS-
SURANCE.

Peake, Serjt., on the part of the agent, showed cause in the first instance, and cited *Hullock on Costs*, 529, 2nd edition, and *Bray v. Hine*,† contending, that the agent was entitled to his general lien against the attorney to the amount of what would have been the attorney's costs, because he could know nothing of the arrangements between the plaintiff and his attorney, but must have supposed the business between them would be carried on in the usual way.

But the Court made the rule absolute, on the plaintiff's paying for the agency in this particular cause; *RICHARDSON*, J. observing, that if the plaintiff had applied at once to the agent to deliver up papers, the agent, as against the plaintiff, could not retain them after receiving the amount of his agency on those papers.

Rule absolute.

DOE DEM. TENNYSON v. LORD YARBOROUGH.

(1 Bing. 24—28; S. C. 7 Moore, 258.)

1822.
June 19.

[24]

Waste land belonging to a vicarage, which land had remained uninclosed and useless from the inability of the vicars to incur the expense of inclosure, was let (having never been letten before), by the incumbent (with the confirmation of patron and ordinary), to C. A. P. for three lives; C. A. P. undertaking to reclaim the land, and to pay a rack rent which was the most that could be obtained: Held, that this lease was not binding on the incumbent's successor.

THIS was an action of ejectment, brought to recover about an acre of land, situate in the parish of Great Grimsby, in the county of Lincoln, called the Old Churchyard. The demise was laid on the 19th of October, 1815. At the trial, at the Spring Assizes for Lincolnshire, 1822, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

† 20 R. R. 623 (6 Price, 203).

DOE d.
TENNYSON
v.
LORD YAR-
BOROUGH.

[*25]

At the time of the demise mentioned in the declaration, the lessor of the plaintiff had been duly presented, instituted, and inducted, into the vicarage of the parish and parish church of Great Grimsby, and was then the lawful vicar thereof. The land in question is part of the possessions of the vicarage, and it was not proved to have been letten before the execution of the lease hereinafter mentioned, but lay in the state described in the said lease, which lease, made on the 2nd day of February, 1776, between the Rev. L. Haldenby, then vicar of the parish church of Grimsby, clerk, of the first part; C. A. Pelham, Esq., of the second part, and John Lawrence and William Lister, of the third part, (after stating, that part of the possession of the vicarage, consisting of one piece or parcel of land, containing by estimation one acre, lying in Grimsby, had not been fenced in the memory of man, and that, therefore, it had been of very little benefit to any of the vicars of Grimsby; that fences could not be made new but at a great expense, which the vicars could not defray, so that the land lay open to the common, and many people laid their rubbish, dung, furze, and fuel thereon, without having leave of L. Haldenby for so doing, and that C. A. Pelham had agreed with *L. Haldenby, in consideration of the grant and demise in those presents contained, at his own expense, substantially to fence and inclose the said piece of ground on every side, insomuch as there would thereby be an improvement thereof, to the benefit and advantage of L. Haldenby and his successors,)—witnessed, that L. Haldenby, for and in consideration of the rent, covenants, and agreements therein specified, and for divers other good causes and considerations him thereunto moving, had demised, granted, and to farm letten, unto C. A. Pelham, his heirs and assigns, all that the said piece of ground, &c., to have and to hold unto the said C. A. Pelham, his heirs and assigns, from the making of the said indenture, for and during the natural lives of C. A. Pelham and two other persons therein mentioned, yielding and paying therefore, yearly, during the said term, unto L. Haldenby and his successors, vicars of Grimsby, the annual rent of one pound, free from all deductions and abatements whatsoever, being the most rent that the premises could be let for; and that if it should

happen that the said yearly rent should be behind or unpaid, in part or in the whole, by the space of forty days next after either of the days of payment thereby appointed, the same being lawfully demanded, then, or at any time after, it should be lawful to and for L. Haldenby and his successors, vicars of Grimsby, into the said premises thereby demised to re-enter, and the same to have again, repossess, and enjoy, as in their former estate. And C. A. Pelham, for himself, his heirs, executors, administrators, and assigns, did covenant, to and with L. Haldenby and his successors, vicars of Grimsby, that he the said C. A. Pelham, his heirs, executors, administrators, or assigns, should, on or before the 2nd day of February then next ensuing, *fence and inclose the said piece of ground on every side, at his or their own proper costs and charges, and should afterwards, during the said term, repair the fences so made with all manner of needful reparations, as often as need should require, and at the determination of the said term, the same, well and sufficiently repaired, would yield up to L. Haldenby or his successors, vicars of Grimsby; and also, that C. A. Pelham, his heirs, &c., should, during the said term, discharge all taxes, assessments, and other payments whatsoever that should be charged on the said piece or parcel of ground, or on L. Haldenby, for or in respect thereof. Lawrence and Lister were appointed attorneys by Haldenby for the purpose of making livery of seisin.

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TENNYSON
v.
LORD YARBOROUGH.

[*26]

The lease was executed by L. Haldenby, who was, as described in the lease, vicar of Grimsby. A memorandum of livery of seisin was indorsed on the lease.

There was annexed to one corner of the lease a separate deed, purporting to be the confirmation of the same lease by Thomas, Lord Middleton, patron of the vicarage of Grimsby. It did not appear otherwise than by the said deed of confirmation that Thomas, Lord Middleton was such patron.

There was also annexed to another corner of the lease another deed, purporting to be the confirmation of the lease by the ordinary, to which was affixed the episcopal seal of John, Bishop of Lincoln.

C. A. Pelham is since Charles, Lord Yarborough, the defendant, and he had been in the possession of the lands in question,

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TENNYSON
v.
LORD YAR-
BOROUGH.

either by himself or his undertenants, ever since the making of the said lease.

When L. Haldenby died, he was succeeded in the vicarage by the Rev. J. Stockdale, who died in April, 1815, and he was succeeded by the lessor of the plaintiff.

[27]

The question was, whether the said lease and confirmations were binding upon the lessor of the plaintiff, who was, at the time of action, incumbent of the said vicarage.

If not, the verdict was to stand for the lessor of the plaintiff; but if binding, then a verdict was to be entered for the defendant.

The Court, stopping *Lawes*, Serjt., who was to have argued for the lessor of the plaintiff, called on *Hullock*, Serjt., who was for the defendant, to support the lease, and enquired how he could reconcile such a letting of lands which had never been letten before, with the words of the statute 13 Eliz. c. 10, s. 3, that all leases by any vicar, "other than for the term of one-and-twenty years or three lives,"—"whereupon the accustomed yearly rent or more shall be reserved,"—"shall be utterly void;" or distinguish this case from *The Bishop of Hereford v. Scory*.†

Hullock, Serjt. :

The object of this statute, as well as of 32 Hen. VIII. c. 28, s. 2,‡ was to prevent clergymen from injuring their successors by granting long leases and taking fines on low rents of their own imposing; the meaning, therefore, of the clause in question must be, that the accustomed rent should be taken where any rent has existed before; and where not, the best rent that can be gotten. The intention of the Legislature was, to secure the best rent for ecclesiastical property, which intention has been completely effected in the present instance; and there are numerous cases where clauses in deeds, that lands shall be let for the accustomed yearly rent or more, have been construed according *to the intention of the parties: *Goodtitle dem. Clarges v. Funucan*.§

[*28]

† Cro. Eliz. 874.

‡ The repeal of this statute by 19 & 20 Vict. c. 120, s. 35 is under the exception "so far as relates to leases

made by persons having an estate in the right of their churches."—R. C.

§ Dougl. 565.

Sed per CURIAM :

In order to meet the expression in the statute, "Whereupon the accustomed yearly rent or more shall be reserved," there must have been some rent reserved before. Our decision must proceed on the statutes taken together ; and, considering them, it is clear that the demise, in order to be valid, must be of lands which have been demised before.

DOE d.
TENNYSON
v.
LORD YARBOROUGH.

STREETER v. HORLOCK.

(1 Bing. 34—38 ; S. C. 7 Moore, 283.)

1822.
June 25.

Where an order is given previously to the delivery of goods to a bailee, to deal with them, when delivered, in a particular manner, to which he assents, and afterwards the goods are delivered to him, a duty arises on his part, on the receipt of the goods, to deal with them according to the order previously given and assented to ; and the law infers an implied promise by him to perform that duty.

[34]

A VERDICT having been found for the plaintiff in this cause, at the last Essex Assizes before Wood, B.,

Onslow, Serjt., in Easter Term, obtained a rule *nisi* for setting aside such verdict and entering a nonsuit, on *the ground of a discrepancy between the contract set forth in the declaration and the evidence adduced in support of it.

[*35]

Taddy, Serjt., having been heard against the rule, and *Onslow* for it, the following judgment was now delivered, which includes all the facts essential to the decision of the Court.

PARK, J. :

This was an action of assumpsit brought against a carrier for not delivering goods according to contract. The question for the decision of the Court is, whether the evidence adduced at the trial is sufficient to support the third count of the declaration.

This count, after stating that the defendant was a carrier of goods in a certain vessel, proceeding from the parish of St. Lawrence in Essex to divers other places for freight and reward, proceeds to allege, that heretofore, to wit, on the 15th day of September, 1821, at the parish aforesaid, in consideration that

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v.
HORLOCK.

the plaintiff, at the special instance and request of the defendant, had caused to be shipped in and on board of the defendant's vessel a large quantity of wheat of great value, to be carried and conveyed therein by the defendant from the parish aforesaid to West Thurrock mill, on or before Monday then next, at and for reasonable freight and reward, to be paid to the defendant in that behalf, the defendant undertook that he would safely carry the said wheat from the parish aforesaid to West Thurrock mill aforesaid, and there deliver the same for the plaintiff, on Monday the 17th day of September, in the year aforesaid.

[*36]

At the trial it appeared, that on Friday the 14th of September, another person applied to the defendant to carry certain goods for him on the ensuing Monday, which the defendant declined, saying, " he had engaged *to deliver 50 quarters of wheat for the plaintiff on the Monday, at West Thurrock mill." Another witness proved, that he carted the plaintiff's wheat to the defendant's barge, lying at St. Lawrence, and gave the defendant's son a note, and told him to deliver the wheat at West Thurrock mill on the Monday; and that all the wheat was delivered to the defendant before nine o'clock on the Saturday morning. It did not distinctly appear at what particular period of the transaction it was that this witness gave the order to deliver the wheat at West Thurrock mill on the Monday; but probably it was given before the whole of the wheat had been shipped on board the vessel.

On this evidence, the objection made on the part of the defendant was, that the third count states a promise made upon a past consideration, viz. in consideration that the plaintiff *had caused* to be shipped, &c.; whereas it appears by the evidence, that the defendant had entered into an engagement to deliver the plaintiff's wheat at West Thurrock mill, before the wheat, or at least before the whole of the wheat, had been actually shipped; and therefore it was argued, that the count ought to have stated the consideration for the promise, in an executory form, viz. that the plaintiff *would cause* to be shipped, &c.

But we are of opinion, that the count may be supported in its present form; and that, whenever, as in this case, an order is given previously to the delivery of goods to a carrier or other bailee, to deal with them, when delivered, in a particular manner,

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to which he assents, and afterwards the goods are delivered to him accordingly, a duty arises on his part, upon the receipt by him of the goods, to deal with them according to the order previously given and assented to; and the law infers an implied promise by him to perform such duty. In the present case, the promise might have *been stated as a promise by the defendant, "to do his duty in that behalf," which would only have been a more concise mode of stating that which is in effect stated in this count.

[*37]

Many instances might be put in which the language of pleading in cases of contract is founded on this principle. Whenever the duty of the defendant, arising upon the execution of the consideration, is simply to pay money, the usual and safest mode of pleading is to declare in *indebitatus assumpsit*; as in the cases of goods sold, work and labour done, and other cases. In *Clarke v. Gray* and others,† it is observed by Lord ELLENBOROUGH, that there is a great variety of agreements not under seal containing detailed provisions regulating prices of labour, rates of hire, times and manner of performance, &c. which are every day declared upon in the general form of a count for work and labour; and his Lordship instances contracts of affreightment in the nature of charter-parties, builders' contracts, and the like. This mode of declaring shews, that the established course is to charge the defendant, not upon the original contract entered into by him at the time of signing the agreement, but upon the implied promise resulting from the execution of the consideration in his favour. So in actions brought by the payee against the drawer of a bill of exchange, the contract actually made by the defendant is made by signing his name to the bill, and delivering the bill to the payee; and this might perhaps be considered as importing a prospective promise on his part to pay the amount of the bill, in the event of due presentment, dishonour and notice, yet it is the constant course to state in the declaration the drawing and delivery of the bill, and then to charge the defendant on an implied promise supposed to be made by him afterwards, in consideration of his liability arising upon these past events.

Other cases might be put; but enough has been said to illustrate the principle.

† 6 East, 564, 569.

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[38]

On the whole, we are of opinion, that the third count of the declaration is supported by the evidence; and, therefore, that the rule for entering a nonsuit must be discharged.

Rule discharged.

1822.
June 25.

GRAVENOR v. WOODHOUSE, AND THOMAS AND WIFE.

[38]

(1 Bing. 38—44; S. C. 7 Moore, 289.)

Avowries, first, by W. and T. for rent due to W. and T. from plaintiff, as tenant to W. and T.; secondly, by W. and T., and his wife, in right of his wife, for rent due to W. and T. and his wife, in right of his wife, from plaintiff, as tenant to W. and T. and his wife, in right of his wife; were holden to be supported by evidence of an attornment from plaintiff to W. and T. and his wife.

REPLEVIN. Avowries, first, by Woodhouse and Thomas, for seven years' rent, due to Woodhouse and Thomas from the plaintiff, as tenant to Woodhouse and Thomas; secondly, by Woodhouse and Thomas for seven years' rent due to Woodhouse and Thomas from the plaintiff, as tenant of the premises, under a demise made to him at the yearly rent of 70*l.*; thirdly, by Woodhouse and Thomas and wife, in right of his wife, for seven years' rent due to Woodhouse, and Thomas and his wife, in right of his wife, from the plaintiff, as tenant to Woodhouse, and Thomas and his wife, in right of his wife; fourthly, by Woodhouse, and Thomas and his wife, in their own right, for seven years' rent, due to Woodhouse, and Thomas and his wife, from the plaintiff, as *tenant to Woodhouse, and Thomas and his wife, in right of his wife.

[*39]

Pleas to each of the avowries, *non tenuit* and *riens* in arrear; and issue thereon.

At the trial, before Garrow, B., last Hereford Assizes, the defendants put in the following attornment:

“Between JOHN GOODTITLE, on the demise of EDWARD WOODHOUSE, JAMES THOMAS, and ANNE his wife . . . Plaintiffs;
and

RICHARD NOTITLE . . . Defendant.

“I, Peter Gravenor, the tenant in possession of the premises

in question in this cause, do hereby attorn and become tenant to the lessors of the plaintiff, Edward Woodhouse, James Thomas, and Anne his wife, of and for all that messuage, farm, and lands, called the Parks, situate in the parishes of Binghill, Wellington, and Canon Pyon, in the county of Hereford, from the 2nd day of February instant, for one year, and so from year to year, at the yearly rent of 70*l.*; subject and without prejudice to any right or claim I may have in equity in the said estate as against the said lessors, or the devisees, legatees, or executors of James Woodhouse, Esq. deceased. As witness my hand, this 9th day of February, 1814.

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WOODHOUSE.

“ Witness, J. HAWKINS.

“ PETER GRAVENOR.”

It was objected, on the part of the plaintiff, that the language of the avowries was not sustained by the attornment, and evidence was offered of a feoffment made to the plaintiff by a person under whom the defendants claimed, and of certain letters from that person containing expressions which were said to be adverse to the defendants' claim, but the learned Judge thought the avowries borne out by the language of the attornment, and rejected the evidence of the feoffment and of the letters, on the ground that the plaintiff ought not to be permitted to dispute his tenancy after having made *the above attornment. A verdict was, therefore, found for the defendants for the whole seven years' rent, none of which appeared to have been demanded before the occasion on which this action was brought; but it was said the parties had been a long time in Chancery.

[*40]

Hullock, Serjt. in Easter Term, moved for a rule to shew cause why a new trial should not be granted, on the grounds, first, that the avowries were not supported by the attornment, inasmuch as consistently with the terms of that attornment, Thomas, in addition to his interest in right of his wife, might have had a separate interest of his own; and, secondly, that the evidence proposed by the defendants had been improperly rejected.

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WOODHOUSE.

Lens, Serjt. who shewed cause against the rule, contended, that an attornment to husband and wife would create a tenancy to the husband, in the same manner as on a demise by husband and wife a covenant to both was in legal effect a covenant to the husband: *Arnold v. Revoult*.† So that the legal effect of the attornment was properly described in the second avowry: *Parry v. Hindle*,‡ *Walsal v. Heath*,§ *Nooth v. Wyard*.|| But, with the addition of the third and fourth avowries, the tenancy was stated in every shape in which it could arise on the attornment. On the second point, he argued, that it was an acknowledged principle, that a party who has consented to become tenant cannot afterwards dispute his lessor's title: *Syllivan v. Stradling*,¶ *Parry v. House*;†† unless it has expired, *England dem. Syburn v. Slade*.‡‡

[41]

Hullock, Serjt. in support of the rule, upon the intimation of a strong opinion by the Court, abandoned the objection to the avowries; but, with respect to the attornment, argued, that it was not conclusive evidence of a tenancy, but only a bare assent, which would not pass any interest or make a bad grant good, or work by way of estoppel (*Sheppard's Touchstone*, 254); and that, therefore, the evidence to rebut the bare presumption arising out of the attornment was improperly rejected. In *Rogers v. Pitcher* §§ it was decided, that even payment of rent is not conclusive evidence of a tenancy.

Cur. adv. vult.

PARK, J. :

This case comes before the Court upon a motion for a new trial; it was an action of replevin. The defendants avowed the taking for seven years' rent in arrear, at 70*l.* per annum, from the 2nd February, 1814, due to Edward Woodhouse, James Thomas, and Anne his wife, in right of the said Anne.

To support the defendants' avowry, they put in an attornment by the plaintiff.

† 1 Brod. & Bing. 443; 4 Moore, 66.

‡ 2 Taunt. 180.

§ Cro. Eliz. 656.

|| 2 Bulstr. 233; 1 Roll. Rep. 52.

¶ 2 Wills, 208.

†† Holt, N. P. 489.

‡‡ 2 R. R. 498 (4 T. R. 682).

§§ 6 Taunt. 202 (1 Marsh. 541).

It was objected at the trial, and the objection was again renewed on the motion, that this instrument to Edward Woodhouse, James Thomas, and Anne his wife, did not support any of the present avowries, which stated the title of James Thomas to be in right of his wife; but on the argument we thought there was nothing in this objection, and it was very properly and candidly abandoned by the learned counsel for the plaintiff: but the second objection to the defendants' title is of more weighty consideration. The defendants had made out a *primâ facie* case; but it appears by the note of my learned brother who tried the cause, that some evidence was offered of letters, and a feoffment from James Woodhouse *(the testator of the defendants) to the plaintiff, Gravenor.

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WOODHOUSE.

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This evidence was not received, and, indeed, it does not very distinctly appear of what nature it was; but the question is, is there not on the case itself sufficient to warrant the Court in at least sending it for further inquiry?

Of the general rule of law, that a tenant shall not be allowed to question the title of his landlord where he has originally received possession from him and has paid him rent, there is no doubt, ever since the case of *Sylliban v. Stradling*. It always furnishes a strong *primâ facie* case: but to the generality of this rule there are exceptions; for, although on the one hand the general rule is most wise and politic, in not allowing a tenant lightly to use to his landlord's detriment that title the possession of which he has entrusted to him, so on the other it is most just so far to guard the tenant, that he may not be carelessly put into the hazardous situation of paying his rent twice over, and being put to the trouble and expense of an action to recover that which he may have been compelled to pay.

The supposed generality of the rule has been departed from in many cases; for instance, in *England dem. Syburn v. Slade*, Lord KENYON and the Court of King's Bench, confirming an opinion of GOULD, J., held, that it was competent for the tenant to shew that his landlord's title had expired, and that he had now no right to turn him the tenant out of possession.

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WOODHOUSE.

In *Doe dem. Jackson v. Ramsbottom*† it was again held, that it was competent for the tenant to shew that his landlord's title had expired; and BAYLEY, J. appears to have relied on the case of *England dem. Syburn v. Slade*, just quoted by me.

[43]

Payment of rent, in all cases, furnishes a strong presumption against the tenant, and it is always a good *primâ facie* case for the landlord: but that is also open to explanation; for, where it has been paid under a misrepresentation, the tenant is not estopped from resisting further payment, after discovery of the mistake.

This was held by the Court of Common Pleas, in the case of *Rogers v. Pitcher*.

GIBBS, Ch. J. in that case says: "The defendant contends, that because he has induced the plaintiff to pay rent to him once or twice, in ignorance too of the facts, she is bound to pay it to him for ever, though she is also bound to pay it to Mrs. Baker. Justice speaks very forcibly against such a position; but if we found any law by which a person having paid rent on one occasion was ever after bound by that payment, we must decide accordingly: but there is no such law."

A variety of cases might be put in which a tenant would be excused from payment of rent to a person not really entitled to it, but I forbear to trouble the Court with any more. The question, then, is, whether in this case there is any reason for an exception to the admitted general rule.

We think that there is. Without forming any judgment *à priori* about the admissibility of this or that particular piece of evidence, with which at present we have nothing to do, we are of opinion there is a sufficient degree of suspicion resting upon the case to induce us to require further investigation.

As far as one can judge from the attornment (which it appears was not quite voluntary on the part of Gravenor, but to prevent the operation of an ejectment), it should seem that Gravenor had been in possession before any title had in fact come to defendants; so that he does not appear originally to have come in under them, though he did, probably, under him *from whom the defendants claim. In the next place, the attorn-

[*44]

ment is dated the 9th February, 1814, and rent is to run from the 2nd February preceding. The rent is pretty considerable, viz., 70*l.* per annum; and yet, from the date of the attornment for seven years, not one farthing of this rent, large as it is, is ever demanded or paid; this is of itself a circumstance of strong suspicion. One may conjecture that the defendants had some very cogent reason for procuring an attornment at that particular time, and never acting upon it for so long a period afterwards. At all events, though all this may receive satisfactory explanation, we think it ought to be submitted to some further inquiry.

It was said that these parties had been long litigating in Chancery, and that that may be a reason why no rent has been demanded.

It does indeed appear by the case of *Woodhouse v. Meredith*,† that there has been much litigation, and the circumstances appearing in that printed report tend rather to excite than to allay suspicion. We, however, wish to be understood to decide this case on the facts, and the surmises fairly arising out of those facts, as they present themselves in the report of the case as tried at Hereford. The rule for a new trial must therefore be made absolute.

I need hardly add, except for form, that from my delivering this judgment, it is clear that my LORD CHIEF JUSTICE, who was not present at the argument, has taken no part in these deliberations.

Rule absolute.

SECOND TRIAL.

(2 Bing. 71—74; S. C. 9 Moore, 148.)

THIS was a special case arising out of the cause reported above, on the construction of a will of certain lands in Herefordshire; but it appearing on the case, that the plaintiff, who now disputed in an action of replevin the defendants' title, had actually attorned to them in a prior action of ejectment, the Court refused to enter into the question on the will, and the only point discussed was, whether three avowries in replevin—first, by Woodhouse and Thomas for seven years' rent due to Wood-

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1824.
May 18.

EASTER
TERM.
[2 Bing. 71]

† 1 J. & W. 204 (unimportant).

GRAVENOR
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WOODHOUSE. house and Thomas from the plaintiff as tenant to Woodhouse and Thomas; secondly, by Woodhouse and Thomas for seven years' rent due to Woodhouse and Thomas from the plaintiff as tenant of the premises under a demise made to him at the yearly rent of 70*l.*; thirdly, by Woodhouse, and Thomas and wife, in right of his wife, for seven years' rent due to Woodhouse, and Thomas and his wife, in right of his wife from the plaintiff as tenant to Woodhouse, and Thomas and his wife, in right of his wife,—were supported in evidence by a declaration in ejectment between John Goodtitle, on the demise of Edward Woodhouse, James Thomas, and Anne his wife, plaintiffs, and Richard Notitle, defendant, followed by the ensuing attornment; "I, Peter Gravenor, the tenant in possession of the premises in question in this cause, do hereby attorn and become tenant to the lessors of the plaintiff, Edward Woodhouse, James Thomas, and Anne his wife, of and for all that messuage, farm, and lands, called the Parks, situate in the parishes of Bingham, Wellington, and Canon *Pyon, in the county of Hereford, from the 2nd day of February instant, for one year, and so from year to year, at the yearly rent of 70*l.*, subject and without prejudice to any right or claim I may have in equity in the said estate, as against the said lessors, or the devisees, legatees, or executors of James Woodhouse, Esq., deceased: As witness my hand this 9th day of February, 1814.

[*72]

" Witness, J. HAWKINS.

" PETER GRAVENOR."

This point had, on the former decision, been abandoned without argument on the part of the plaintiff, but was now [fully argued. In the course of the argument were cited *Wire v. Bellert*, Cro. Jac. 442; *Bowles v. Poore*, Cro. Jac. 282; *Osborne v. Wallenden*, 1 Mod. 273; and *Pullen v. Palmer*, 3 Salk. 207.]

[*73]

BEST, Ch. J. :

I think that there is no variance between the avowries and the proof adduced in support of them. It appears that the avowries are made, first, by Woodhouse and Thomas for seven years' rent due from the plaintiff as tenant to Woodhouse and Thomas; secondly, by Woodhouse and Thomas for rent due to them from

the plaintiff as tenant of the premises; so that they clearly insist that the plaintiff holds under them. It has been urged that, according to the attornment, the wife has also an interest which ought to have been stated in the avowries; but it appears by cases to which we have *been referred, that as the husband may sue alone upon a covenant to himself and his wife, so he may avow alone, where he is landlord in her right: we have then to see whether the attornment and the demise in the declaration in ejectment support these avowries. The demise is by Edward Woodhouse, James Thomas, and Anne his wife, and the plaintiff by his attornment has admitted that he holds under Edward Woodhouse, James Thomas, and Anne his wife; but Woodhouse and Thomas have avowed, and the avowry by Thomas includes any interest he might have in right of his wife.

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PARK, J. :

I am of opinion on the authority of the cases, that these avowries (at all events the second,) are supported in evidence by the attornment and declaration in ejectment. My difficulty was on the difference between actions of contract and replevin, but the authority in Croke and 1 Mod. Rep., and the reference made by Lord Holt† to the case in Croke have satisfied me. The husband had a right to distrain in his own name for any interest he had in right of his wife, and the attornment, therefore, supports the avowry.

BURROUGH, J. concurring,

Judgment was given for the defendants.

† *Pullen v. Palmer*, 3 Salk. 207.

1822.
June 19.
[50]

MACKINTOSH AND OTHERS v. BARBER, GARRATT, AND OTHERS.

(1 Bing. 50—60; S. C. 7 Moore, 315.)

A., by will, directed his real and personal estate to be sold, the produce to be invested in the public funds in the names of trustees, for his son and daughter, and two others. Directions were given as to succession in cases of death without issue; and if all the legatees should die under age, and without issue, the property was to go over to B., C., D., and E., and their heirs; which four persons A. appointed as his executors, to see that everything was duly performed according to his will; he also appointed F. and G. as executors, in addition to the above persons, for which he requested those two friends would accept of 50*l.* each; he also requested F. and G. to act as guardians, in conjunction with B., C., D., and E., for the care of the persons and property of the legatees. The will was duly attested, but there was an unattested codicil, that if either of the executors should refuse to accept the trust and act as executor, the bequest of property to every such person was totally annulled.

The testator died, and the will was proved by B., C., and D. only, E., F., and G. having renounced.

Part of the real estate having been put up to sale in four lots, was purchased by G., who afterwards refusing to complete his purchase, a suit was instituted in Chancery. That Court decreed that the codicil was not to be considered as part of the will with reference to the real estate, but that the rest of the will ought to be established, and the trusts performed; and upon reference to the Master, it was found that the contract of purchase entered into by G. was for the benefit of the legatees, (who were infants).

Lot 1 was then conveyed by lease and appointment and re-lease from B., C., D., E., F., and G. to T., in consideration of 2,000*l.* Lot 2, by lease and appointment, and re-lease from B., C., and D. to T. for 2,300*l.*, (T. declaring by another deed, that the consideration-money, mentioned in the two first deeds, belonged to G.; that the name of T. was only used as a trustee, and that T. stood seised of the premises in trust for G.), Lot 3, by lease and appointment and re-lease, from B., C., and D. to G., to the use of G. for 4,000*l.* Lot 4, by lease and appointment, and re-lease, from B., C., D., E., F., and G. to G., to the use of G. for 360*l.*: Held that by these conveyances the legal estate in Lots 1 and 2 was well vested in T., and the legal estate in Lots 3 and 4 in G.

THE following case was sent by the VICE-CHANCELLOR for the opinion of this Court.

[*51] John Mackintosh devised his estate, called Piggott's Manor Farm, in the *parish of Aldenham, in the county of Herts, with all timber, live and dead stock, utensils of husbandry, &c.; also all his household furniture, plate, linen, wine, wearing apparel, and every other thing which might be upon the said premises

at the time of his death, to be sold as soon after his decease as possible and convenient, in such manner as might be productive of the greatest value : after directing the payment of all his just debts, and of a legacy to Thomas Shears, he bequeathed unto his son John Mackintosh, his daughter Eliza Jane Mackintosh, Mary Ann Shears, and Martha Shears, the whole residue of his property of every description and kind, to be divided betwixt them in separate and equal proportions, subject to certain directions contained in the will, by which all the property was ordered to be invested in the public funds, in the names of trustees to be appointed by the executors ; and arrangements were made touching succession, in case of the death of any of the legatees under age ; among which arrangements, one was, that if all the legatees should die without issue, before they arrived at 21 years of age, then the property bequeathed to them, was to devolve to and become the property of Mr. Joseph Barber, Mr. John Slapp, Mr. Frederick Grigg, and Mr. George Capper, to be divided betwixt them in equal proportions, and to their heirs for ever ; which last mentioned four persons, the testator appointed as his executors, to see that everything was duly executed and performed according to his will and desire, in his will expressed ; he also appointed Mr. Francis Garratt, and Mr. John Garratt, as executors in addition to the above persons, for which he requested those two friends would accept of 50*l.* each. He also requested, that Messrs. Francis and John Garratt would act as guardians in conjunction with Mr. Capper, Mr. Barber, Mr. Grigg and Mr. Slapp, for the care of the persons and property of his son John, Eliza Jane Mackintosh, and Mary *Ann, and Martha Shears. The testator almost immediately afterwards, added an unattested codicil to his will in the words following : “It must be understood that it is my will and intention, that if either or more than one of my executors shall refuse to accept the trust and act as executor according to the directions given in my will, then I annul totally my bequest of any property to every such person who shall so refuse to take the trust upon himself. J. MACKINTOSH.” The will was proved in the Prerogative Court of Canterbury, on the 22nd June, 1818, with the codicil, by Joseph Barber, John Slapp, and Frederick Grigg, three of the executors, George

MACKINTOSH
T.
BARBER.

[*52]

MACKINTOSH Capper, Francis Garratt, and John Garratt, having first
BARBER. renounced the probate and execution thereof.

The defendants, Barber, Slapp, and Grigg, who proved the will, in the execution of the trusts thereof, caused the testator's estate, called Piggott's Manor Farm, to be put up to sale by public auction on the 3rd July, 1818, in four lots;

The defendant, John Garratt, one of the executors and trustees named in the will, but who had renounced the execution thereof, attended at the sale, and was declared the highest bidder for and purchaser of all the lots, and signed a contract accordingly.

The defendant, John Garratt, having so become the purchaser of the said estates, afterwards declined completing his purchase, on the ground, that although the acting executors might sell the estate without the concurrence of those who had renounced, yet that they could not sell to either of those who had renounced; and thereupon a suit in Chancery was instituted.

[*53] By the decree pronounced by that Court on the hearing of the cause, it was declared, "that the memorandum at the foot of the will of the testator, was not to be considered as part of the will with reference to the testator's real estate, but the Court declared that the rest of the testator's will ought to be established, *and the trusts thereof performed and carried into execution, and ordered and decreed the same accordingly." And it was also ordered by the Court, that it should be referred to one of the Masters, to inquire and state to the Court, whether it would be for the benefit of the plaintiffs, the infants, and the other persons interested in the testator's estate, that the contract entered into and signed by the defendant, John Garratt, for the purchase of the testator's estate, should be completed and carried into execution. The Master afterwards certified, "that it would be for the benefit of the said plaintiffs, the infants, and the other persons interested in the testator's estate, that the contract entered into and signed by the defendant, John Garratt, for the purchase of the said testator's estate, called Piggott's Manor Farm, should be completed and carried into execution."

Accordingly, by indentures of lease and appointment and release duly executed, and bearing date respectively, the 1st and 2nd of January, 1822, and made between Joseph Barber, John

Slapp, Frederick Grigg, George Capper, Francis Garratt and John Garratt, of the one part, and Peter Thompson of the other part: Joseph Barber, John Slapp, Frederick Grigg, George Capper, Francis Garratt and John Garratt, for and in consideration of the sum of 2,000*l.* to them in hand, paid by Peter Thompson at the time of the execution thereof, the receipt whereof they did thereby respectively acknowledge, did, and each of them did appoint, grant, release, and convey unto Peter Thompson, (in his actual possession, then being by virtue of a bargain and sale, &c.) and to his heirs, the lot No. 1, to hold unto the said Peter Thompson, his heirs and assigns, to and for the only proper use and behoof of the said Peter Thompson, his heirs and assigns for ever, with usual covenants from trustees, and receipt for consideration money indorsed and duly witnessed.

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And by other indentures of lease and appointment and release, bearing date the said 1st and 2nd January, 1822, and made between Joseph Barber, John Slapp, and Frederick Grigg, on the one part, and Peter Thompson of the other part, Joseph Barber, John Slapp, and Frederick Grigg, in consideration of the sum of 2,300*l.* to them in hand paid by Peter Thompson, at the time of the execution thereof, (the receipt whereof they did thereby acknowledge,) did appoint, grant, release, and convey unto the said Peter Thompson, (in his actual possession then being, by virtue of a lease for a year,) the lot No. 2, to hold, unto the said Peter Thompson, his heirs and assigns, for ever, with usual covenants from trustees, duly executed and attested, and receipt for consideration-money indorsed and duly witnessed.

[54]

By another deed, duly executed by Peter Thompson, he declares, that the purchase-monies mentioned in the last deeds were not his money, but that the whole thereof was the money of and belonged to the said John Garratt, and that the name of him, Peter Thompson, was made use of in the said deeds as a trustee only for John Garratt, and that he stood seised of the said estates and premises as a trustee for John Garratt, his heirs and assigns, and to be from time to time conveyed and disposed of as he or they should direct and appoint.

And by indentures of lease and appointment and release, bearing date the said 1st and 2nd January, 1822, and made

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between Joseph Barber, John Slapp, and Frederick Grigg, of the one part, and John Garratt of the other part, Joseph Barber, John Slapp, and Frederick Grigg, in consideration of the sum of 4,000*l.* to them in hand paid by John Garratt, at the time of the execution, (the receipt whereof they did thereby acknowledge,) did appoint, grant, release, and convey unto the said John Garratt, in his actual possession then being, (by virtue *of a lease for a year,) the lot No. 3, to hold unto the said John Garratt, his heirs and assigns, to the use of him the said John Garratt, his heirs and assigns for ever, with usual covenants from trustees, duly executed, and receipt for consideration-money indorsed and duly witnessed.

[*55]

By similar deeds all the six executors, in consideration of 360*l.* paid to them by the said John Garratt, did appoint and convey the lot No. 4, unto and to the use of the said John Garratt, his heirs and assigns for ever.

The question for the opinion of the Court was, whether the legal estate in fee of and in lots Nos. 1, 2, 3, and 4, parts of the estate in question in this cause, or any of them, is well vested in Peter Thompson and the defendant, John Garratt, or either of them, by the conveyances made to them.

This case was argued, first, in Easter Term last, and now for the second time.

Bosanquet and *Hullock*, Serjts. for the plaintiffs :

It being admitted that there is no fraud in this case, nor any breach of trust on which equity will interfere, the only question is, whether there exist strict legal objections against any or all of these conveyances. It seems clear that the executors had a power to sell, for the desire expressed by the testator is sufficient to create such a power : *Anon.*, 2 Leon. 220; *Bentham v. Wiltshire* ; † *Patton v. Randall*.‡ But it is objected to the second and third conveyances, that the acting executors named in a will cannot convey to one who has renounced ; and, to the first and fourth conveyances, that an executor or trustee cannot convey to himself, it being assumed that *the conveyance to Thompson is indirectly a conveyance to Garratt.

[*56]

† 20 R. R. 271 (4 Madd. 44).

‡ Sugd. on Powers, 173, note, 3rd ed.

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The objection to the second and third conveyances does not arise; for, in the sale of this estate, the executors did not act *quâ* executors having an interest, but in the exercise of a naked power, unaccompanied with any interest, there being no words in the will which invest them with any interest; so that in this, as in every case of the exercise of a naked power, [which is a mere modification of a use: *Goodill v. Brigham*,†] the appointee takes under the original instrument creating the power, and not under the appointment itself; and there can be no objection to Garratt's taking under the will, which creates the power in question.

Even admitting Barber, Grigg, and Slapp, to have acted in the sale as executors having an interest, it may fairly be contended, that the testator meant that those three and Capper should alone be concerned in the sale of the estate, and that the Garratts were afterwards named, rather as guardians to the children than as executors. At all events, though a party may be still deemed an executor, who renounces after being absolutely appointed by the will, yet this cannot be affirmed of a party, who, renouncing under a power of renunciation, given him by the words of the will itself, has in fact never been absolutely appointed executor. It is true, that if an executor, absolutely appointed by the will, renounces, he may, notwithstanding, afterwards take out probate, and act, but he cannot set aside acts done by the other executors without him; so that supposing Garratt to have been actually executor, and to have renounced under ordinary circumstances, still the statute 21 Hen. VIII. c. 4, expressly legalizes a conveyance by the residue of the executors, where some or one of them refuses.

The only authority to the contrary, is a passage in Co. Lit. 113 a, where it is laid down, that if one refuses, the others cannot make sale to him that refused, because he is party and privy to the will, and remains executor still: but this passage rests on a case in *Bendloe and Dallison*, p. 15, said to have been decided in *Trinity*, 41 Edw. III., which is reported in the same words in the book called *Old Bendloe*,† p. 14, in *Keilway*, 207 b, and in *Anderson*, 27. *Anderson*, however adds, “*Quære* the law after the said statute.” So that the case is not entitled to much weight;

† 1 Bos. & P. at p. 196, per EYRE, divers resolutions et judgments, &c., Ch. J. fol. 1661.

† *Benloe*, *Gulielme*, Reports des

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and Lord KENYON says (in *Withnell v. Gartham*†), “That the distinction respecting sales by the survivors, where power is given to persons by name, and when it is given by name of office, is founded on law, which was, perhaps, a little doubtful in its origin, and was the occasion of making the statute 21 Hen. VIII. c. 4; for it appears by the preamble, that that Act was passed, rather to remove doubts than to make a new law; it recites, that such a sale of lands, after the opinion of divers persons, can in no wise be good or effectual in law.” Further, the reason on which the case in *Bendloe* was decided, namely, that the renouncing executor is still a party, applies equally to cases before and after the statute, so that if that reason be not well founded, the second and third conveyances under the statute remain unimpeached.

[*58]

This leads to the consideration of the objection to the first and fourth conveyances, which may be divided into two heads; first, that a party cannot convey to himself; secondly, that at all events, he cannot do so where he is an executor, such a conveyance being inconsistent with his duty as an executor. The first head of the objection is of a nature purely technical, and occasioned by the *ancient forms of conveyances: as, with respect to a conveyance by bargain and sale; a man cannot bargain and sell to himself, because of the supposed absurdity of such a contract; for the same reason, he cannot enfeoff himself or his wife; but there is nothing in the common law which prohibits a conveyance by a party to himself, provided he can effect it consistently with the technical forms of conveyance. Thus a party may enfeoff another with the intent to take back the estate to himself, or to himself and his wife; so he may covenant to stand seised to the use of himself or his wife, or he may convey to the use of himself and his wife; the owner of an advowson may present himself; the donee of a general power of appointment may execute it in favour of himself; why, therefore, might not these executors execute in favour of themselves, or one of themselves, the power of appointing to a purchaser? or how in the absence of fraud can the conveyance by all of them to Thompson be impeached? If an appointment to a stranger can be set

aside by proof *in pais* that the stranger takes for the appointor, no conveyance under a power can be safe.

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Then, secondly, the principle that a trustee cannot be the purchaser of a trust estate, is a mere rule of equity; if proper forms be observed, the conveyance is good at law; and unless a trust has been abused, a court of equity will not set aside such a conveyance: *Campbell v. Walker*,† *Sanderson v. Walker*.‡ Even when equity has interfered on the ground, that a trust has been abused, it has always decreed a reconveyance, which would be unnecessary if the conveyance to the trustee were void; and, though such interpositions have taken place on applications against a trustee, there is no instance of an application by a trustee to set aside a conveyance made to himself. Here, the conveyance *is for the benefit of the *cestuis que trust*, and the consequences of holding such a conveyance to be void, might in other cases be most injurious to subsequent *bonâ fide* purchasers.

[*59]

Lens and Vaughan, Serjts. for the defendants, relied mainly on the passage in Co. Lit. 113 a, and the case in Bendloe, which, they observed, was also stated as law in 1 Roll. Abr. 329, and had never been questioned in any subsequent decision. They contended, that no distinction could be made between the rights of an executor for the purpose of sale, and the rights of an executor for ordinary purposes, the law not recognizing two sorts of executors. So that, on these grounds, the second and third conveyances must be holden void.

With respect to the fourth, that Garratt, notwithstanding his renunciation, remained an executor for all legal purposes: *Robinson v. Pett*,§ *Middleton's case*.|| That the interests of an executor as a purchaser were so entirely opposed to his duty as a seller, that the Courts would never uphold a transaction, which, if decided to be legal, might be productive of the most ruinous consequences to infants and others, for whose benefit executors were entrusted with power. That where parties enfeoffed for the purpose of a re-enfeoffment to themselves, the conveyance was of their own estate, and not of the estate of

† 5 R. R. 135 (5 Ves. 678).

‡ 9 R. R. 234 (13 Ves. 601).

§ 3 P. Wms. 251.

|| 5 Co. Rep. 28.

MACKINTOSH *a cestui que trust*: and where a party presented himself under
 v. his own advowson, institution by the bishop, and induction were
 BARBER. necessary, before he could become possessed of the living. So
 that there was no ground for saying that the objection to the
 fourth conveyance was merely technical, or that such a convey-
 ance could be supported under any view of the case.

[60] If that conveyance was void, so was also the first, the object
 of that being exactly the same as the object of the fourth,
 and *quod prohibetur per directum prohibetur et per obliquum*;†
Magdalen College case;‡ *Carmelite Friars'* case.§ In Jenkin's
Centuries, p. 189, it was holden, that executors could not retain
 land to pay debts, but were bound to sell to some one not an
 executor.

Cur. adv. vult.

The following Certificate was afterwards sent :

“ This case has been argued before us by counsel ; we have
 considered it, and are of opinion that, under all the circum-
 stances within stated, the legal estate in Lots 1 and 2 is well
 vested in Peter Thompson, and the legal estate in Lots 3 and
 4 is well vested in the defendant, John Garratt, by the convey-
 ances made to them respectively.

“ R. DALLAS.

“ J. A. PARK.

“ J. BURROUGH.

“ J. RICHARDSON.”

† Co. Lit. 223 b. Wingate's
Maxims, 618.

‡ 11 Co. Rep. 73.
 § *Ibid.* Wingate, 619.

C. P. MICHAELMAS TERM.

PALMER AND OTHERS v. BLACKBURN.†

(1 Bing. 61—64; S. C. 7 Moore, 339; 1 L. J. C. P. 1.)

The general principle of insurance, that the insured shall, in case of a loss, recover no more than an indemnity, may be controlled by a mercantile usage clearly established to the contrary: and usage, that the loss in an open policy on freight shall be adjusted on the gross, and not on the net amount of the freight, is a legal usage.—DALLAS, Ch. J. *dubitante*.

1822.

Nov. 8.

[61]

ASSUMPSIT on an open policy of insurance on freight. At the trial before Dallas Ch. J. London sittings after Trinity Term last, it appeared that the ship *Juliana*, bound from the East Indies to London, was totally lost just before the termination of her voyage. The freight payable to the plaintiffs in the event of the safe arrival of the ship would have been 3,068*l.*; but out of this the plaintiffs must have paid 699*l.* 9*s.* for seamen's wages, pilotage, light dues, tonnage duty, and *dock dues; from which payment they were altogether exempted by the loss of the vessel.

[*62]

The defendant contended that the plaintiffs were entitled to recover from the insurers, not the amount of the gross freight, but only the amount of the net freight, after deducting the charges which the plaintiffs must necessarily have incurred had the ship arrived in safety; and he paid into Court sufficient to cover his proportion of the amount of the net freight.

The plaintiffs persisted in demanding the amount of the gross freight, and called merchants of 30 and 40 years' experience at Lloyd's, who concurred in stating, that though open policies on freight were extremely rare, the uniform custom in settling losses upon them, had been to pay the assured on the amount of the gross freight.

To the admission of this evidence the defendant objected, on the ground that it proposed to establish the existence of a custom contrary to law, a policy of insurance being a contract, the object of which was to secure to the assured a bare in-

† Richardson, J. was absent being prevented from attending by during the whole of this Term, ill-health.

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BLACKBURN.

demnity; whereas a usage such as the present would secure to him a profit on, and operate as inducement to the loss of ship.

The learned Judge having admitted the evidence, subject to future discussion on the point, the defendant called witnesses nearly equal in number and experience, who stated that they were not aware of the existence of the usage stated by the plaintiffs' witnesses.

The jury having found for the plaintiffs the whole demand,

[*63]

Bosanquet, Serjt. now moved for a rule to shew cause why the verdict for the plaintiffs should not be set aside, and a nonsuit, or a verdict for the defendant, be entered instead, on the ground that the evidence admitted for the plaintiffs ought to have been excluded, and that, at *all events, the usage established thereby was contrary to law, and to the very nature of an insurance. Instead of an indemnity, the owner would, if the usage were sustained, derive a very great advantage from the loss of his ship; in the present instance, in the proportion of near 700 to 3068, in many instances considerably more: indeed it would be his interest that the ship should be lost as soon as possible after quitting her port of departure, as he would then secure his freight, and be saved the whole expense of paying and provisioning the crew for the voyage, and of defraying the heavy port charges, to which he would otherwise be liable. Then, in all adjustments of general average to which ship, cargo, and freight contributed, the charge on freight was always calculated on the net, and not on the gross freight,† and if the owner was called on to pay in that proportion, why should he be paid in a greater?

DALLAS, Ch. J.:

The evidence in support of the usage was as strong as possible; the evidence on the part of the defendant only of a negative character, and I put it to the jury to consider whether the usage was so notorious as to imply a knowledge of it in the parties to the action, and so to form a part of their contract. But the defendant's counsel contends that, admitting the existence of the

† Park on Insur. 209, 7th ed.; Marshall on Insur. 467.

usage, it is contrary to law—contrary to the very principle of a policy of insurance, as being no more than a contract for indemnity—opening a wide gate to fraud, and thence, that in law, it cannot be supported. Without giving any opinion on the subject, I think the point of considerable importance, and worthy of further consideration.

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PARK, J.:

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I think a rule ought not to be granted in this case. The chief objection made on the part of the defendant is, that the evidence ought not to have been admitted. I think it was properly admitted on both sides, and, if it was admissible, there can be no ground for a new trial; the jury would have drawn a very wrong conclusion if they had found there was no such usage. They have found that open policies on freight have always been settled in this manner, and my experience entirely coincides with that finding.

BURROUGH, J.:

In questions on policies of insurance, the course has always been to ascertain the custom of merchants; there is a strong instance of this in 1 Burr. Rep.† where it being found to be an universal and well known usage for China ships to unrig and place their tackle in a warehouse on Bank Saul, in Canton River, the insurers on a ship were held liable for a loss happening to her tackle by fire on this Bank Saul. Now, the usage in the present instance, is as well known to all the brokers as that was relating to Bank Saul, and, in these cases, the usage of trade has always been the ground of decision.

Rule refused.

PRIDDEE v. COOPER.‡

(1 Bing. 66; S. C. 7 Moore, 358; 1 L. J. C. P. 8.)

Process may be served at any hour.

1822.
Nov. 14

[66]

VAUGHAN, Serjt. shewed cause against a rule obtained by Hullock, Serjt. to set aside the service of a *capias ad responden-*

† *Pelly v. Royal Exchange*, 1 Burr. 341.

‡ See now R. S. C. Ord. 9, r. 2. And compare Ord. 64, r. 11.—R. C.

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COOPER.

dum, and all subsequent proceedings on the ground of irregularity, because the service did not take place till after ten at night. *Vaughan* argued that there was a distinction between service of notices and service of process; that unless the latter could be served at any hour, there might be no means of catching the defendant.

The COURT being also clearly of this opinion, the rule was

Discharged with costs.

1822.
Nov. 25.

SHORT v. PRATT.†

(1 Bing. 102; S. C. 7 Moore, 424; 1 L. J. C. P. 9.)

[102]

The Court will not call upon an attorney summarily to answer the matters of an affidavit, charging him with an indictable offence, but will leave the parties complaining to their prosecution for the offence.

PELL, Serjt. upon an affidavit, imputing to two attorneys of this Court, concerned in the above cause, misconduct amounting to a gross case of cheating, conspiracy, and maintenance; moved for a rule, calling on them to shew cause why they should not deliver up to the plaintiff's present attorney certain papers belonging to the plaintiff, explain certain accounts of monies received by them to the plaintiff's use, and answer the matters contained in the affidavit.

But the COURT thought, that as a charge had been brought forward clearly amounting to an indictable offence, they could not interfere or call on the attorneys to make an affidavit in which they might be compelled to criminate themselves: they therefore recommended another application, calling only for papers and accounts, and refused the rule for which *Pell* had moved.

† Followed in an anonymous case (1834) 5 B. & Ad. 1088. But, more recently, the more useful practice has been adopted of granting the rule, leaving the attorney charged to take any course he may think that should arise out of the criminatory nature of the charge against him. That is to say, he may evade con-

tempt by refusing to answer on the ground that he might criminate himself, at the risk of the Court taking the view that he ought to be struck off the rolls by reason of his not having cleared himself of the charge: *In the Matter of an Attorney*, Q. B. (1873) 17 Sol. J. 269.—R. C.

EX PARTE BROOKES.†

(1 Bing. 105—106.)

1822.
Nov. 27.

[105]

A. being committed for a forgery, the prosecutor called on him in prison, and said he had no wish to appear against A., but that the attorney concerned (an attorney of this Court,) would proceed, unless his costs were paid, which the prosecutor had no means of paying: he then proposed that A. should advance the money; A. did so, and it got into the hands of the prosecutor's attorney; notwithstanding this, A. was put on his trial, and the prosecutor appeared against him; A., however, being acquitted, applied to this Court to compel the prosecutor's attorney to refund the money, putting in an affidavit of his innocence of the offence charged on him, and that he paid the money because, from his knowledge of the parties, he believed his life in danger.

The Court refused to interfere.

PELL, Serjt. moved for a rule to shew cause why Hill, an attorney of this Court, should not be ordered to pay to Brookes, or to the officer of the Court, the sum of 140*l.*, money of Brookes's, which had got into Hill's possession under the following circumstances: in the Old Bailey Sessions before the last, Brookes stood indicted for a forgery: some time before his trial, the prosecutor called upon Brookes in prison, and said that he had no wish to appear against him on the trial, but that his attorney (Hill) would proceed with the indictment, unless he (the prosecutor) would pay him his costs, which he was unable to do. It was then proposed* that Brookes should advance the money to cover the costs, and that the trial should not be proceeded with; Brookes gave 140*l.*, 50*l.* of which found its way into Hill's hands before the trial, and 90*l.* afterwards. Brookes, in his affidavit, now stated that he gave the money under the impression, from his knowledge of the parties opposed to him, that his life was in danger, though he swore positively that he was innocent of the crime of which he then stood accused, and of which he was afterwards acquitted.

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DALLAS, Ch. J.:

If Brookes has paid this money without consideration, and Hill has received it unlawfully, Brookes has his remedy at law. The Court, however, will not, on all occasions, drive a party

† See as to security given to stifle a criminal prosecution, *Williams v. Bayley* (H. L. 1866) L. R. 1 H. L. 200; 35 L. J. Ch. 717.—R. C.

Ex parte
BROOKES.

from whom an attorney withholds money, to bring his action at law for its recovery, but will interfere in a more summary manner, if it sees just grounds. Now, is the party making the application here entitled to such peremptory interference? Taking his own affidavit, what appears?—that this person has paid this money to compound a capital felony. It is almost unnecessary to say that, to compound a felony is a misdemeanour, and a very high one; and subjects the party so acting to a heavy punishment. The party here has confessed his endeavour to compound a felony, and now seeks to recover the money by means of which he attempted to commit the offence. This is the first time I ever heard such an application; and if the Court were to interfere in the manner required, they would be sanctioning a very high crime. I see no claim whatever which this party has to our interference, and therefore I am of opinion that the rule must be refused.

PARK, J. and BURROUGH, J. expressed their concurrence in the opinion of his Lordship.

Rule refused.

C. P. HILARY TERM.

1823.
Feb. 5.

RICHARDSON *v.* FISHER.

(1 Bing. 145; S. C. 7 Moore, 546.)

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[THE report from Moore being the more complete, will be found in its place, 24 R. R. 690.]

1823.
Feb. 5.

RENNIE *v.* ROBINSON.

(1 Bing. 147—149; S. C. 7 Moore, 539; 1 L. J. C. P. 30.)

[147]

A. hired apartments by the year of B.; B. afterwards let the entire house to C., who sued A. in an action for use and occupation for the hire of the apartments: Held, that, as A. could not impeach B.'s title, neither could he impeach that of C.

THIS was an action for use and occupation of apartments in Mary-le-bone, brought under the following circumstances: the house which contained the apartments had been devised to a

Mrs. Williams, and by a settlement made after her marriage, in pursuance of marriage articles, was vested in trustees for her separate use, and the power of leasing was in the trustees. But the settlement *was not registered. The husband of Mrs. Williams let the apartments to the defendant as a yearly tenant, under an agreement from Williams and his wife, but signed only by Williams, and afterwards made a lease of the house to the plaintiff, in which Mrs. Williams did not join, and to which she refused to assent. The lease by Williams to the plaintiff, recited Mrs. Williams's marriage settlement. Williams gave the defendant notice of the transfer, and the plaintiff demanded the rent for the apartments; notwithstanding which, the defendant paid it to Mrs. Williams, and never attorned to the plaintiff.

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At the trial before Dallas, Ch. J., Middlesex sittings after last Trinity Term, Williams was called by the defendant to shew that the house belonged to Mrs. Williams, and his evidence was objected to, on the ground that he could not impeach his own lease to the plaintiff: Mrs. Williams, however, was admitted, and the marriage settlement was proved. To the objection that it was not registered, (the house standing in Middlesex), it was answered, that the settlement being recited in the lease to the plaintiff, he could not plead want of notice, which was all the Registry Acts proposed to supply. The plaintiff was nonsuited, with leave to move to set the nonsuit aside, and enter a verdict for 17*l.*, the sum due for the occupation of the house, should the Court be of opinion that the defendant could not impeach his title.

Taddy, Serjt. having accordingly obtained a rule *nisi* to that effect, citing *Arnold v. Revoult*, † to shew the validity of the conveyance by Williams without his wife's joining in the conveyance,

Pell, Serjt. now shewed cause against the rule, and contended, that though a lessee could not in any case dispute the title of his immediate lessor, nor the title of the lessor's assignee, in an action of replevin, yet that in an action of contract like the

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† 1 Brod. & Bing. 443.

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present, he might dispute the title of any person but his immediate lessor. If there was no contract, actual or implied, between the plaintiff and defendant, this action would not lie. Had the plaintiff, indeed, been assignee of Williams, he might have sued the defendant in covenant, supposing a covenant to have existed. But the plaintiff was merely a lessee under Williams, and if the legal estate in the house in question was in trustees, Williams could not convey to the plaintiff, so that in no way could a contract exist between him and the defendant.

DALLAS, Ch. J. :

The defendant has used and occupied the premises under a lease from Williams, and so has recognized Williams's title: Williams then conveys to Rennie, and the defendant has notice of this conveyance. Rennie only stands in the shoes of Williams, but the defendant continues to occupy under him, and as the defendant was not competent to impeach the title of Williams, neither is he competent to impeach that of Rennie.

PARK, J., concurred.

BURROUGH, J. :

The reversion which was in Williams is in Rennie, and the defendant cannot controvert his title.

Rule absolute.

FISHER AND ANOTHER, ASSIGNEES OF CHESMER,
A BANKRUPT, v. MILLER, WHO HAS SURVIVED HENNING.

(1 Bing. 150—155; S. C. 7 Moore, 527.)

1823.
Feb. 5.

[150]

A. had, for the purpose of sale, consigned a cargo of fish to B., who was in correspondence and connected with the house of C. C. had advanced money to A., on an engagement from A. that the proceeds of the cargo of fish should be remitted by B. to A. through the hands of C., in order that they might so constitute a security for the money advanced by C. A. then wrote to B., telling him that the cargo of fish was not responsible for any advances made by C. Notwithstanding this B., after the receipt of A.'s letter, remitted the proceeds to C., who retained them to cover his advance. A. having become bankrupt, and his assignees having sued B. for these proceeds:

Held, that a jury was warranted in considering A.'s engagement as an appropriation of the cargo of fish, which he could not rescind, and not a mere order for payment of money, which could be revoked by a subsequent countermand before payment.

THE plaintiffs sought by this action to recover 500*l.* which the defendant had received for Chesmer upon the sale of a cargo of fish, and which, as the plaintiffs alleged, defendant had improperly paid over to the house of M'Intosh and Wartnaby, contrary to Chesmer's directions.

At the trial before Dallas, Ch. J., London sittings before Michaelmas Term last, the state of the case appeared to be as follows.

Chesmer, who resided in London, was in 1814 the owner of a cargo of fish, shipped at Newfoundland in a vessel called the *Martha*; the defendant Miller carried on business in partnership with Henning, at Rio Janeiro. Messrs. M'Intosh and Wartnaby, who carried on business in London, and were in correspondence and connected with the defendant, recommended him to Chesmer as a proper person to dispose of any cargoes which Chesmer might send to Rio Janeiro, and Messrs. M'Intosh and Wartnaby being for premiums of insurance and otherwise considerably in advance to Chesmer upon certain cargoes of wine, in two ships, called the *Venus* and the *Sisters*, it was agreed, that those cargoes should *be consigned to the defendant at Rio Janeiro, and that he should remit the proceeds to Chesmer, through the house of M'Intosh and Wartnaby, by way of security for the sums advanced by them.

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MILLER.

Things were in this state, when in October, 1814, Chesmer applied to M'Intosh and Wartnaby to advance 500*l.* more for Thomas Morris, who had before that time been in partnership with Chesmer, and was then engaged in business with his brother William Morris. T. Morris and Wartnaby, who were called as witnesses, stated, that M'Intosh and Wartnaby being already much in advance to Chesmer, were reluctant to give him further credit, till Chesmer promised that the proceeds of the cargo of fish, as well as of the other cargoes, should also be remitted by the defendant through the hands of M'Intosh and Wartnaby, to be by them applied in reduction of the advance of 500*l.*; upon which M'Intosh and Wartnaby, on the 20th of October, 1814, advanced the 500*l.* to T. Morris, which they would not otherwise have done, and the amount was afterwards, on the 14th of March and 10th of May, 1815, remitted to them by the defendant Miller out of the proceeds of the cargo of fish.

The plaintiff also claimed 58*l.* 16*s.* beyond this 500*l.*

Sundry letters were then given in evidence. In one of July 28th, 1814, addressed by Chesmer to M'Intosh and Wartnaby, Chesmer said, "As I have always considered any business I may do with Messrs. Miller and Henning, under your guarantee, and have been encouraged therein by the respectability of your firm, I cannot have the least objection to direct those friends to remit us, on or through you, for my consignment per *Venus* and *Martha*. The *Venus* will load about 280 pipes of wine and brandy; you will do me the favour of informing me what advances you will make on this cargo, on handing over the bills of lading at a *pro ratâ* *per pipe. The *Martha* is loading at Newfoundland a cargo of about 2500 quintals of fish in casks, to the address of Messrs. Miller and Henning. I expect to receive the bills of lading in September; as the latter come forward, and insurance is effected by you, your acceptances, as for the *Venus's* cargo on account, and on transferring to you the bill of lading, will be a great accommodation to me; I request, therefore, you will inform me whether you can comply with my request."

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In a letter, dated the 21st October, 1814, and addressed by Chesmer to Miller and Henning, Chesmer said, "Our friends, Messrs. M'Intosh and Wartnaby, having agreed to advance

Messrs. W. and T. Morris for our account 500*l.*, on the security of our cargoes per the *Venus* and *Sisters*, consigned to you," "We hereby direct and empower you to pay them that sum." "The management of the sales will remain with you until Messrs. M'Intosh and Wartnaby's demand is paid from the cargoes of the *Venus* and *Sisters*." "The security given the latter does not apply to the *Martha's* cargo of fish, which please to observe."

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(Signed),

"CHESMER & Co."

In a letter of the 1st of January, 1815, marked "private," and addressed by Chesmer to Miller, Chesmer, after announcing the dissolution of his partnership with T. Morris, said, "Mr. Morris had no sort of interest in the cargoes of the *Venus* and *Martha*, of which the returns are legally and incontestably mine, to support my engagements and advances for the liquidation : amongst the latter are claims of Messrs. M'Intosh and Wartnaby, for their advances on the *Sisters'* account, for premiums of insurances as brokers, and for 500*l.*, which I consented to give Messrs. W. and T. Morris by an assignment on you from the net proceeds of the *Martha* *and *Venus's* cargoes consigned to you ; I am sure you will excuse my frankness when I tell you, that, having of myself directed you from Spain and Newfoundland, the cargoes of the *Venus* and *Martha*, without Messrs. M'Intosh & Co. or Mr. Morris having advanced one fraction on account of these cargoes, I could not avoid feeling uneasiness when I understood that your London friends declined any support to your house, and grounded their refusal on unliquidated sales by your concern."

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A letter was also proved, bearing date the 8th of March, 1815, addressed by Miller at Rio Janeiro, to Chesmer, by which Miller acknowledged the receipt of Chesmer's letter of the 21st of October, 1814, (saying, "We take notice of your order of the 21st of October,") and also thanked Chesmer for his private letter of January 1st, 1815.

The jury found a verdict for the plaintiff, damages only 58*l.* 16*s.*

Pell, Serjt. for the plaintiff, in the last Term moved for a rule, *nisi* to set aside this verdict, and to have a new trial. He

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contended that Miller and Henning were Chesmer's agents; that it was an incontestable principle, that where a party ordered his agent to pay money, and afterwards, before the money was paid or passed in account, countermanded such order, the agent paying after such countermand, must be deemed to have made the payment wrongfully and without authority. He then urged, that it was by no means clear in the present case, that Miller had ever received any order to pay the 500*l.* in question to M'Intosh and Wartnaby out of the proceeds of Chesmer's cargo of fish. But even if they had, Chesmer's letter of the 21st of October, 1814, was a clear countermand of any such order, and Miller's letter of the 8th of March, 1815, acknowledging the receipt of Chesmer's letters of the *21st of October, 1814, and 1st of January, 1815, and saying that he took notice of the order of 21st October, shewed that he himself considered the countermand to be complete, notwithstanding any ambiguity occasioned by the letter of the 1st of January, 1815.

The Court having granted a rule *nisi*,

Vaughan and *Hullock*, Serjts. now showed cause against the rule, and took a distinction between a mere order to pay, and an actual appropriation of a fund for payment. As to a mere order to pay, they admitted the principle laid down by *Pell*; but they contended, that such principle did not apply to the case of an appropriation, which they insisted a party could not rescind after he had once completed it. They then argued, that the testimony of *Morris* and *Wartnaby* established a complete appropriation by *Chesmer* of the cargo of fish, for the purpose of securing the advance of 500*l.*; that *Chesmer's* letter of the 21st of October, 1814, written immediately after this appropriation, was little else than a direct fraud, but whether so or not, it could not rescind a previous appropriation of the proceeds of the cargo. They cited *Firbank v. Bell*. †

Pell, in support of his rule, contended that there had been no appropriation, and that, therefore, the verdict was contrary to evidence.

† 1 B. & Ald. 36.

DALLAS, Ch. J. :

FISHER
v.
MILLER.

If what the witnesses said be true, the letter of the 21st of October was written in violation of the agreement under which Chesmer had obtained the money. But the letter of the 1st of January, 1815, is a direct admission of that agreement: the jury had the letters and the accounts before them, and not one of *them had any doubt that the cargo of fish had been appropriated to the payment of the advance of 500*l*. I told the jury there was no doubt as to the law; that as a general principle, it was quite clear that an agent who receives orders to pay, is not justified in doing so, if before payment he receives counter orders. But I directed them to consider the correspondence and the testimony of the witnesses, and to determine whether or no an appropriation had been made. They were satisfied that such was the case, and I see no reason for disturbing the verdict.

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PARK, J. :

If Morris and Wartnaby are believed, there was an appropriation of the cargo of fish, which Chesmer had no power to rescind. A party who obtains money on an agreement, cannot be allowed thus to deprive the lender of the security which was stipulated for and granted, and this does not at all affect the power of a principal to countermand an order given to an agent to pay money.

BURBROUGH, J. :

After the testimony of Morris and Wartnaby, it cannot be doubted that M'Intosh & Co. advanced their money upon the assurance, that they should have the security of the cargo of fish; if so, that security could not be retracted. The verdict is clearly right, and the present rule must be

Discharged.

1823.

Feb. 7.

[158]

TURNER *v.* MEYMOTT.†

(1 Bing. 158—160; S. C. 7 Moore, 574; 1 L. J. C. P. 13.)

A tenant having omitted to deliver up possession when his term had expired after a regular notice to quit, the landlord, in his absence, broke open the door, and resumed possession; though some articles of furniture remained.

The tenant having obtained a verdict against the landlord in trespass for this entry, the Court granted a new trial, holding that the landlord might so enter in such case.

TRESPASS for breaking and entering plaintiff's house. At the trial before the Lord Chief Baron, Guilford Summer Assizes, 1822, it appeared that the plaintiff had been tenant of the house to the defendant, from week to week; that he had received a regular notice to quit, but omitted to deliver up possession, whereupon, the defendant, at a time when nobody was in the house, broke open the door with a crow-bar, and other forcible applications, and resumed possession. Some little furniture was still in the house. The CHIEF BARON having said that the law would not allow the defendant thus forcibly to reinstate himself, the jury found a verdict for the plaintiff, whereupon,

Taddy, Serjt. obtained a rule *nisi* for a new trial, and

Pell, Serjt. now shewed cause against the rule:

The question is, whether when a tenant refuses to deliver possession after a regular notice to quit, the landlord may make a forcible re-entry: but it cannot be permitted he should take the law into his own hands, and do that by violence which is

† There has been much divergence of opinion as to the civil liability for forcible entry by the rightful owner. In *Newton v. Harland* (1840), 1 Man. & Gr. 644, the Court of Common Pleas decided that a landlord has not a right to enter and expel by force a tenant holding over. This case was the subject of a divergence of opinion in the Court and has since been much questioned. *Davis v. Burrell* (1851) 10 C. B. 821, per Cresswell, J. at p. 825; *Pollen v.*

Brewer (1859) 7 C. B. N. S. 371. See also *Beddall v. Maitland* (1881) 17 Ch. D. 174, 50 L. J. Ch. 401; *Edwick v. Hawkes* (1881) 18 Ch. D. 199, 50 L. J. Ch. 577; Pollock on Torts, 4th Ed. 343; Lightwood on Possession of Land, 136-143. At all events the prudent council, in advising an owner wishing to regain possession, will keep in mind that a forcible entry is indictable under the statutes 5 Rich. II., stat. 1, c. 7, and 8 Hen. VI., c. 9.—R. C.

usually accomplished by an action of ejectment. It is contrary to the first principles of law, that he should become judge in his own cause, and substitute his own strength for the ordinary civil process. If there had been resistance, and death had ensued, the crime of murder would have been committed; and it makes no difference that nobody was in the house, for the defendant could not ascertain that till he entered, and the plaintiff might have come up while the violence *was in progress. Some furniture being in the house, this was not a case of vacant possession. The statute of 11 Geo. II., which gives the landlord double value where the tenant holds over, shews what is the appropriate remedy in such cases; but that statute would be useless if the landlord might thus take the law into his own hands. It might be urged that if the landlord had proceeded irregularly he would be liable in an indictment for a forcible entry, but his subsequent liability would not justify the previous wrong. In *Taunton v. Costar*,† the entry made by the landlord's putting his cattle on the ground was entirely peaceable, and to that there could be no objection; so that Lord KENYON's observation, "that if he dispossessed the tenant with a strong hand, he would be liable for a forcible entry, but there could be no doubt of his right to enter on the land at the expiration of the term," was uncalled for by the case before him, and leads to the absurdity that, in certain cases, a landlord may enter, and yet he shall be punished for the entry.

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v.
MEYMOTT.

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Pell also referred to *Davis v. Connop*.‡

DALLAS, Ch. J. :

The high respect which I entertain for my Lord Chief Baron has alone made me hesitate a single moment, and even now, perhaps, as the cause is to go down to be tried again, I ought not to express an opinion. The question is, whether a landlord has a right to enter in the manner the defendant did under the circumstances of this case, in which the tenant held over after his right to possession had ceased, and the landlord's right to enter had accrued. It must be admitted he had a right to take possession in some way; the case of *Taunton v. Costar* is in

† 4 R. R. 481 (7 T. R. 431).

‡ 15 R. R. 693 (1 Price, 53).

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v.
MEYMOTT.
[*160]

point, to shew that he might enter peaceably, and that no ejectment was *necessary. If he has used force, that is an offence of itself; but an offence against the public for which, if he has done wrong, he may be indicted.

PARK, J. :

I am of the same opinion. The declaration states that the defendant broke and entered the house of the plaintiff, but the fact was not so; the plaintiff had gone out, and the house was not his, but his landlord's, who had a right to break his own door; as no person was within, there could be no danger to any man's life. Lord KENYON says, in *Taunton v. Costar*, "it is clear the landlord could have justified in a plea of *liberum tenementum*. There can be no doubt of his right to enter upon the land at the expiration of the term;" and that decision, in my judgment, goes the whole length of the present.

BURROUGH, J. :

I was once concerned at the Cockpit in a case similar to the present, where I used the same arguments as have now been urged by my brother *Pell*, but Lord KENYON and Lord ALVANLEY who were there, entertained no doubt, and said the landlord might enter. The rule for a new trial in this case must be made

Absolute.

C. P. EASTER TERM.†

CLIFFORD v. BURTON.

1823.
April 19.
[199]

(1 Bing. 199—200; S. C. 8 Moore, 16; 1 L. J. C. P. 61.)

Where the wife served in her husband's shop, and carried on the business of it in his absence: Held, that admissions made by her on application to pay for goods before delivered at the shop, were receivable in evidence against her husband.

In this cause, which was tried before the Lord Chief Baron at the last Hertfordshire Assizes, the plaintiff, in order to

† Richardson, J., was absent during this Term, being afflicted with ill health.

CLIFFORD
v.
BURTON.

substantiate a demand for goods sold and delivered at the defendant's shop, proved an admission made by the defendant's wife, who served in his shop, and carried on the business of it in his absence. The witness applied to her for 28*l.* 16*s.*; and the admission consisted in her saying, she would pay it if the plaintiff would allow 10*l.*, which she claimed, and give a receipt in full.

It was objected, that the circumstance of the wife's serving in the shop was not evidence of such a general *agency as would authorise her thus to settle an account, or the Court to receive evidence of such a transaction, which was altogether separate and distinct from her service in the shop.

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The evidence having been received, and a verdict found for the plaintiff,

Taddy, Serjt. now moved for a new trial on the above objection to the wife's evidence :

He contended, that admissions by her in the character of agent, must be confined to the transactions in which she was immediately employed ; that she had no authority to settle an account except as part of the *res gestæ* upon the delivery of goods in the shop ; and that evidence of admissions made upon a separate application for payment ought to have been excluded. In *Emerson v. Blonden*,† and in *Anon.* 1 Str. 527, the wife was acting within the scope of her authority, and what she said constituted a part of the authorized transactions. But a principal is not bound by the representations of the agent made at a different time : *Peto v. Hague*.‡

But the Court thought there was evidence from which it might be presumed the wife was acting within the scope of her authority when she offered to settle a demand for goods delivered at a shop in which she served, and the business of which she was in the habit of conducting ; and they

Refused the rule.

† 5 R. R. 725 (1 Esp. 142).

‡ 5 Esp. 134 ; 1 Smith, 417.

1823.
April 19.

SNAPPE AND WIFE v. DOBBS.

(1 Bing. 202—204; S. C. 8 Moore, 23; 1 L. J. C. P. 58.)

[202]

Where, under an Act of Parliament, a canal reservoir was made over lands in which A. and B. had separate interests, and the Act provided "that it should be lawful for the owner or owners of the lands on which any such reservoir should be made to let all the water out of such reservoir once in seven years, for the purpose of taking the fish therein:" Held, that A. and B. were not tenants in common of this septennial fishery.

THIS was an action of account: the plaintiffs in their declaration alleging that they and the defendant had held together and undivided, as tenants in common, nine acres of land covered with water, and a fishery, of which the defendant had the management to take the fish, and as bailiff of the plaintiffs, to render a reasonable account of what he received more than his just share thereof; and that he never accounted.

And the question was, whether the defendant was tenant in common with the plaintiffs of this fishery:—at the trial before *Bosanquet*, Serjt. who sat for RICHARDSON, J. at the last Worcester Assizes, the facts were as follow.

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The plaintiffs and defendant were separately possessed of two pieces of land, about four acres and a-half each, which the proprietors of the Birmingham Canal Navigation had converted into a reservoir under the provisions of 31 Geo. III. c. 59. By the 11th section of that Act it is provided, "That it shall be lawful for the owner or owners of the lands on which any such reservoir shall be made, to let all the water out of such reservoir once in seven years, for the purpose of taking the fish therein; the water to be so taken out in the month of November, and at no other time."

Under this section it was contended, that the plaintiffs and defendant, though severally interested in the lands over which the reservoir had been made, were tenants in common of the fishery established by the septennial exhaustion of the reservoir; but *Bosanquet*, Serjt. thought their interest in the fishery was several; that each party was entitled to have the fish left on his own land when the reservoir was exhausted; and he accordingly directed a nonsuit.

STAPE
v.
DOBBS.

Peake, Serjt. now moved to set aside this nonsuit and enter a verdict for the plaintiff, or to have a new trial, on the ground, that from the nature of the case, the plaintiff and defendant must be tenants in common of the fishery, because, as the fish would pursue the ebbing water, and finally be stranded on the land of the party who was lowest down the stream, no fish would remain stationary over the land of either, and there would be no means, in case of exhausting the reservoir, of giving each his fair share of the profits, without supposing a tenancy in common in all the fish; the fish thus passing from the water of one into the water of the other, the parties must have the same sort of right as they would have, if the root of a tree had extended from the land of one into *the land of the other; and in that case, they would be tenants in common of the tree: *Waterman v. Soper*.†

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But the COURT thought that each of the parties had a several right of fishery in the water over his own land, and that when the reservoir was exhausted, each must take his chance of the fish that should be left aground on his own soil.

Rule refused.‡

† 1 Ld. Raym. 737.

‡ *Note*.—The Act of Parliament vests the fishery in the owners of the land on which the reservoir shall be made. The land on which the reservoir in question was made, was, in fact, purchased absolutely by the

canal proprietors of the plaintiffs and the defendant, with sufficient for a considerable margin round the banks; so that it should seem the canal proprietors are entitled to the fishery, and not the parties in this cause.

1823.
April 29.

[213]

WAKEMAN v. ROBINSON.†

(1 Bing. 213—216; S. C. 8 Moore, 63; 1 L. J. C. P. 70.)

If one does an injury by unavoidable accident, an action does not lie; *aliter*, if any blame attaches to him, though he be innocent of any intention to injure; as if he drive a horse too spirited, or pull the wrong rein, or use imperfect harness, and the horse taking fright kills another horse. In such a case the COURT refused to grant a new trial, though the judge who presided, after summing up, told the jury the defendant was liable, even though the accident were unavoidable, and no blame were imputable to him; omitting to direct the jury to consider whether the accident was unavoidable or occasioned by any fault in the defendant.

TRESPASS for driving against plaintiff's horse, and injuring him with the shaft of a gig. Plea, general issue. There was also a special plea, which was not supported by the defendant's evidence at the trial.

The case then made out (London sittings after last Michaelmas Term) was as follows:

The plaintiff's waggon and horses were proceeding slowly along their proper side of the road towards London. The defendant was coming from London in a gig, at the rate of seven or eight miles an hour. When the defendant was near the plaintiff's waggon, a coach proceeding towards London approached them on the side of the road opposite to that which was occupied by the waggon. The defendant drove between the coach and the waggon; and though in the interval there was room for two or three carriages abreast, the horse of the defendant plunged, and running the shaft of the gig against one of the plaintiff's waggon-horses, so injured him that he afterwards died.

The defence set up was, that the defendant's horse being frightened by the near, noisy, and rapid approach of a butcher's cart, became ungovernable; that the injury being thus occasioned by unavoidable accident, without any negligence or default on the part of the defendant, he was not in any way responsible for the consequences. The weight of evidence, however, went *to establish, that the defendant's horse was young, and spirited; that he had no curb-chain; that the defendant in his alarm pulled

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† Compare *Stanley v. Powell* '91, this case is commented on in the 1 Q. B. 86, 60 L. J. Q. B. 52, where judgment.—R. C.

WAKEMAN
v.
ROBINSON.

the wrong rein, and that he ought to have continued a straight course, allowing the coach to pass between him and the waggon.

The learned Judge who presided directed the jury, after a full summing up, that this being an action of trespass, if the injury was occasioned by an immediate act of the defendant, it was immaterial whether that act was wilful or accidental. He did not direct them to consider whether the accident was occasioned by any negligence or default on the part of the defendant, or was wholly unavoidable, nor was he requested to do so by the defendant's counsel.

The jury found a verdict for the plaintiff.

Pell, Serjt. now moved for a new trial, on the ground of an alleged misdirection :

He contended, that if the mischief complained of was occasioned by unavoidable accident, without any negligence or default on the part of the defendant, the defendant was excused on the general issue, though he might have been the immediate cause of the injury: *Gibbons v. Pepper*,† *Weaver v. Ward*.‡ In the cases in which defendants have been held liable, though innocent of any intention to do injury, they were open to blame in some way ; as for using a dangerous implement without sufficient caution : *Underwood v. Hewson*,§ or for being out of their proper place : *Leame v. Bray*.|| In those cases, too, the question was not so much whether the defendant was liable, as what kind of action would lie. But where no blame could attach,—as if the defendant were driving with care a quiet horse, sufficiently harnessed, and an *accident should be occasioned by such a horse becoming unmanageable through sudden and accountable fright, such a defendant was not liable for the consequences ; it ought, therefore, as in actions for running down ships, to have been left to the jury to determine, whether or no any blame attached to the defendant.

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Vaughan, Serjt. who opposed the rule, relied on *Leame v. Bray*, in which case GROSE, J. says, “ If the injury be done by the act of the party himself at the time, or he be the immediate

† 1 Ld. Raym. 38.

‡ Hob. 134.

§ 1 Str. 596.

|| 3 East, 593 ; 5 Esp. 18.

WAKEMAN
v.
ROBINSON.

cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass." He also contended, that as the whole case was summed up to the jury, they had sufficient opportunity of forming an opinion as to the degree of blame which attached to the defendant.

Pell was heard in support of his rule.

DALLAS, Ch. J. :

If the accident happened entirely without default on the part of the defendant, or blame imputable to him, the action does not lie ; but, under all the circumstances that belong to it, I regret that this case comes before the Court. The action was trespass, and the trespass was clearly made out against the defendant. It has been contended, indeed, that the defendant would not have been liable under any form of action ; but, upon the facts of the case, if I had presided at the trial, I should have directed the jury that the plaintiff was entitled to a verdict ; because the accident was clearly occasioned by the default of the defendant. The weight of evidence was all that way. I am now called upon to grant a new trial, contrary to the justice of the case, upon the ground that the jury were not called on to consider whether the accident was unavoidable, or occasioned by the fault of the defendant. *There can be no doubt that the learned Judge who presided would have taken the opinion of the jury on that ground, if he had been requested so to do ; and under all the circumstances, I am of opinion, that a new trial ought not to be granted in this case.

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BURROUGH, J. concurred, and the rule was

Discharged.

1823.
April 30.

KEZIA LATHBURY v. ARNOLD AND ANOTHER.

(1 Bing. 217; S. C. 8 Moore, 72; 1 L. J. C. P. 71.)

[217]

[THIS case will be found reported in its place in 8 Moore, 24 R. R. 693.]

FROST v. BENGOUGH.

(1 Bing. 266—268; S. C. 8 Moore, 180; 1 L. J. C. P. 96.)

1823.
May 12.
[266]

In an action on a promissory note, the defendant having pleaded the Statute of Limitations, the plaintiff gave in evidence, as proof of an acknowledgment within six years, the following letter from the defendant to the plaintiff: "Business calls me to Liverpool. Should I be fortunate in my adventures, you may depend on seeing me in Bristol; otherwise, I must arrange matters with you as circumstances will permit." The defendant did not shew that there were any other matters besides the promissory note to which the letter could refer: Held, that it was properly left to the jury to decide whether this letter referred to the matter of the promissory note, and was a sufficient acknowledgment to take the case out of the statute.

THIS was an action on a promissory note for 30*l.*, dated 15th of May, 1815; the defendant pleaded the Statute of Limitations; and the plaintiff, at the trial before Dallas, Ch. J. London sittings after Michaelmas Term last, gave in evidence the following letter from the defendant to the plaintiff, as proof of a subsequent acknowledgment:

"SIR,—Business calls me on the sudden to Liverpool. Should I be fortunate in my adventures, you may depend on seeing me in Bristol in less than three weeks; otherwise, I must arrange matters with you as circumstances will permit. I shall leave town to-morrow night.

"H. BENGOUGH."

"LONDON, 24th September, 1817."

DALLAS, Ch. J. told the jury he was not aware of any letter so general as the one in question having been considered sufficient to take a case out of the statute, but that no evidence had been offered of any other dealings between the parties; and the jury were to decide, under those circumstances, whether the letter applied to the transaction in dispute.

The jury found a verdict for the plaintiff; and upon being asked, said, they considered that the letter given in evidence referred to the promissory note.

Vaughan, Serjt. moved for a new trial, on the ground that this letter contained no acknowledgment of the *debt, and that

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FROST it ought not to have been left to the jury to put a construction
 v.
 BENGOUGH. on it.

Taddy, Serjt. shewed cause :

The letter contained a sufficient acknowledgment, if there were no other dealings between the parties ; no evidence was offered of any such dealings, and all that was left to the jury was, not to put a construction on the letter, but to say whether there were any other transactions to which it could apply. In *Lloyd v. Maund*,† it was holden that a letter, the terms of which were ambiguous, ought to be left to the jury.

Vaughan :

In *Lloyd v. Maund* the letter contained much more than in the present case. In *Beale v. Nind*,‡ BAYLEY, J. says, “ the onus of taking a case out of the Statute of Limitations is upon the plaintiff ; ” so that he ought to have shewn that there were no other dealings to which the letter could refer. But even if there were none such, the letter is insufficient to charge the defendant, since it contains no acknowledgment whatever of any debt, and according to Lord ELLENBOROUGH a distinct acknowledgment is necessary : *Rowcroft v. Lomas*.§

PARK, J. :

I think there ought to be no new trial in this case. Within our memory, the Statute of Limitations has been too much frittered away ; because, even where a party denied that he owed any thing (*Bryan v. Horseman*),|| “ it being more than six years since he contracted,” Lord ELLENBOROUGH held him liable, and in this court there have been several cases in which the evidence of admission has been but slight : but in this case, a paper is produced, which, though ambiguous, is sufficient to shift on the defendant the onus which was *at first on the plaintiff, and the defendant might have shewn, if he could, that there were other matters to which the letter applied. In *Beale v. Nind*

† 2 T. R. 760.

‡ 4 B. & Ald. 571.

§ 4 M. & S. 458.

|| 4 East, 599. [Overruled, *Muck-*

low v. St. George (1812) 4 Taunt. 613 ; *Tanner v. Smart* (1827) 6 B. & C. 603.—B. C.]

it was left to the jury to consider, whether there was only one account to which the defendant's supposed admission could refer. Was is not fit, then, that this letter should go to the jury? *Lloyd v. Maund* is an important case to that point. The letter containing the acknowledgment was in that case, as in the present, ambiguous ; but ASHHURST, J. says, " though this letter is written in ambiguous terms, there are some parts of it from which the jury might perhaps have inferred an acknowledgment of the debt ; and I think the jury should have put their construction upon it." That case, therefore, is a warrant for the propriety of what has been done in the present. Whether or no the jury have drawn the right conclusion, it is not necessary for us to decide ; if it were, I should concur in that conclusion.

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v.
BENGOUGH.

BURROUGH, J. :

There is nothing to which the letter appears to relate, but a prior demand. " Should I be fortunate in my adventures, you may depend on seeing me in Bristol ;"—Why ? To bring down what his fortune produced.—" Otherwise I must arrange matters with you as circumstances will permit." I think the jury did right in referring this to an existing demand. The defendant might, perhaps, have shewn that there were other demands to which the letter applied, but he omitted to do so ; and I think it was properly left to the jury to decide whether it applied to the plaintiff's demand or no.

Rule discharged.†

† Dallas, Ch. J. was absent, being unwell.

C. P. TRINITY TERM.†

THOMPSON v. MASHITER.‡

(1 Bing. 283—286; S. C. 8 Moore, 254; 1 L. J. C. P. 104.)

Goods landed at a wharf, and deposited by a factor to whom they were consigned in a warehouse on the wharf till an opportunity for sale should present itself, are not distrainable for rent due in respect of the wharf and warehouse.

In 1817, the plaintiff consigned eleven tons and a half of whalebone to Stephen Cleasby, of London, broker, as his factor or agent, for sale. This whalebone was landed at Ramsay's wharf, a public waterside wharf, and was afterwards placed in Ramsay's warehouse over the wharf, for safe custody, at a weekly rent, till an opportunity should offer for selling it. In 1818 the whalebone was taken from the management of Cleasby, and placed by the plaintiff under the management of Messrs. Devereux and Lambert for sale, as the brokers and factors of the plaintiff; and the whalebone was in consequence transferred from the name of Cleasby to the name of Devereux and Lambert, by the wharfinger.

In 1818 Ramsay the wharfinger became insolvent, and was at that time indebted to the defendants in the sum of 200*l.* for rent in arrear, in respect of the wharf and warehouse. The defendants then caused a distress to be made on Ramsay's wharf and warehouse, and among other goods seized the plaintiff's whalebone.

The plaintiff sued in trover for the value of the whalebone; and at the trial before Park, J. London sittings after Hilary Term last, obtained a verdict for the amount.

Lawes, Serjt. took a rule *nisi* to set aside this verdict and enter a nonsuit.

† Richardson, J., was absent during this term, being confined to his house by ill health.

‡ Cited and distinguished by

BLACKBURN, J. in *Lyons v. Elliott* (1876) 1 Q. B. D. 210, 215, 45 L. J. Q. B. 159, 161.—R. C.

Vaughan and Taddy, Serjts. shewed cause :

THOMPSON
v.
MASHITER.

Whether the plaintiff's goods be deemed to have been in the possession of the factor or of the wharfinger, they are equally protected from distress ; and this for the benefit *of trade. As to the factor, the point has been determined by the case of *Gilman v. Elton* ;† and the case of the wharfinger is expressly mentioned in argument, in *Francis v. Wyatt*,‡ and not denied by the Court. Whether the wharf be private or public the goods are equally protected ; on the same principle as wool at a neighbour's beam (*Rede v. Burley*),§ a horse in a hostry, or sacks of corn in a mill or market.|| The case also falls within the rule laid down in *Gisbourn v. Hurst*,¶ that goods are exempted which are delivered to a man to be managed in the way of his trade ; for the factor had the management of these goods for the purpose of sale, and the wharfinger or warehouseman to keep them dry and in good order.

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Lawes, in support of his rule :

The case of *Gilman v. Elton* is distinguishable from the present, in the material circumstance, that there the goods were on the premises of the factor himself ; but though the case of a wharfinger has been mentioned in argument, there is no decision in which it has been held that goods on a wharf or warehouse are exempted from distress. In almost all the exemptions which have been permitted for the benefit of trade, the goods have been deposited with the bailee to be managed or wrought on ; as clothes left with a tailor to be made up, or a horse placed with a blacksmith for the purpose of being shod : or the place in which they have been left has been so public, that the landlord could never give his tenant credit on the strength of any property he might see on the premises ; as in the case of goods at a fair, or horses at an inn. But the wharfinger has nothing to do with the management of the goods, and his warehouse at least is a private edifice.

† 23 R. R. 567 (3 Brod. & Bing. 75).

‡ 3 Burr. 1503.

§ Cro. Eliz. 596.

|| Co. Litt. 47 a.

¶ 1 Salk. 250.

THOMPSON DALLAS, Ch. J. :

c.
MASHITER.
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I think, that in this case the plaintiff's goods were not liable to be distrained: it has not been argued, that they would have been liable if they had been sent immediately to the wharfinger and had remained in his hands; we may therefore assume, that for public convenience and the benefit of trade, goods so deposited would not have been liable.

If it were necessary we might consider these goods still to have been in the possession of the factor for a temporary purpose, when they were deposited in the warehouse, and that it makes no difference whether the warehouse be in the factor's occupation or hired for the purpose of the deposit: but the factor is agent for the owner of the goods, and as such, deposits them in Ramsay's warehouse, so that the case is the same as if the owner had sent them immediately to Ramsay's, where, on the broad principle of public convenience, I think they were not liable to distress.

PARK, J. :

The cases were all considered in *Gilman v. Elton*; and the general principle laid down in that case is applicable to the present. The principle there laid down was, that certain exemptions of goods from distress were permitted, not on account of the character of the individual in whose hands the goods were deposited, but for the benefit of trade. On that general ground we now decide, and not on the ground that Ramsay was the servant or stood in the place of the factor. The instances put by Lord Coke are merely illustrative, but they apply in principle, though none of them, perhaps, in terms.

The judgment of Lord HOLT, and the facts of the case in *Gisbourn v. Hirst*, apply closely to the present. He there lays it down, "that goods delivered to any person exercising a public trade or employment, to be carried, wrought, or managed, in the way of his trade or employ, *are for that time under a legal protection, and privileged from distress for rent;" and even with respect to a private undertaking, "that any man undertaking for hire to carry the goods of all persons indifferently, is, as to this privilege, a common carrier, for the law has given

the privilege in respect of the trader, and not in respect of the carrier;" and he refers to *Rede v. Burley*, where wool at a private beam was held to be not liable to distress. Therefore, keeping to the broad and general principle of convenience and benefit to trade and commerce, I think these goods ought not to have been distrained.

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BURROUGH, J.:

These goods were brought to the wharf in the course of trade, and ought therefore to be protected.

Rule discharged.

DALLAS, Ch. J. added, that the exemption for goods on a wharf, though only asserted in argument in *Francis v. Wyatt*, was not dissented from by the Court or adverse counsel.

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(1 Bing. 287—302; S. C. 8 Moore, 302; 1 L. J. C. P. 109.)

A person employed by the grantor of an annuity to raise money, and by the grantee to pay the consideration money to the grantor, having at the time of the payment of the money received back some part of it for a debt alleged to be due from the grantor to himself, the COURT, on motion, set aside the annuity on the grantor's paying principal and interest at 5 per cent., though the grantee never received any of the money so returned, and was ignorant of that part of the transaction.†

LAWES, Serjt. had obtained in Easter Term, 1822, a rule *nisi* for staying proceedings upon judgments given by the defendant to the plaintiffs as securities for the payment of an annuity granted by him, and for delivering up to be cancelled the deeds

† The Act 53 Geo. III. c. 141 (repealed by 17 & 18 Vict. c. 90) enacted (s. 2) that within thirty days after the execution of a deed securing an annuity, a memorial should be enrolled of (inter alia) "the pecuniary consideration or considerations for granting the same." Notwithstanding the repeal of the usury laws, the principles of the judgment in this

case appear to be not without their application to modern Acts such as the Bills of Sale Acts, as to which may be cited as leading cases *Hamilton v. Chaine* (1881) 7 Q. B. Div. 319, 50 L. J. Q. B. 456; *Ex parte Firth*, *Re Cowburn* (1882) 19 Ch. Div. 419, 51 L. J. Ch. 473. In some jurisdictions, at any rate, they may still be of general importance.—R. C.

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securing the annuity, upon the ground of a retainer of part of the consideration money, and of a defect in the memorial of the annuity, on which latter objection the Court gave no opinion.

The following statement was made in the various affidavits produced on the occasion :

The defendant swore, that having previously employed Messrs. Howard and Gibbs to raise money for him by way of annuity, he, in 1818, applied to them for more, when they recommended him to pay off his former annuities and raise sufficient for his other occasions ; and that the Star Life Assurance Company, of which they were managers and directors, would advance him any sum by way of annuity at 12*l.* per cent., provided defendant would pay Messrs. Howard and Gibbs a commission of 9*l.* per cent. for their procuration of the money and the expense of preparing deeds. That the Star Life Assurance Company having become first grantees of an annuity from the defendant of 2,400*l.*, and Frederick St. John, second grantee, the plaintiffs being two of the proprietors of the Star Life Assurance Company, and intimately connected with Howard and Gibbs, who acted as their agents, became third and fourth grantees of an annuity of 744*l.* ; but the consideration money was *not paid to the defendant, but was received by Howard and Gibbs, who deducted and retained thereout their commission at the rate of 9*l.* per cent., and placed the remainder of the consideration-money to the credit of the defendant.

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The plaintiff, Coventry, swore that having in the hands of Howard and Gibbs a balance of 1,200*l.*, he was applied to by H. and G. to invest it in purchasing part of an annuity of 744*l.* to be granted by the defendant for a sum of 6,200*l.*, and that he authorised them so to dispose of it ; that his share of the annuity was 144*l.*, and that he actually advanced 1,200*l.* part of the consideration ; that he lived in the town of Bedford, and had never been connected with Howard and Gibbs in money matters, except as before mentioned, and matters of a like nature ; that he was not a proprietor of the Star Life Assurance Company, otherwise than as being possessed of four shares of 50*l.* each out of 2,000 similar shares ; that he never directly or indirectly interfered in the business of the company ; that

he never knew of any commission of 9*l.* per cent., or any other commission being deducted or retained by H. and G. ; and that if such was the case, it was without his privity or consent.

The plaintiff, Gorton, being dead, his nephew and executor swore, that he never knew, nor from inspection of the testator's books or papers could he discover that the testator was by any means whatever party or privy to, or ever in any way directly or indirectly participated in charges for commission, or other charges made by Howard and Gibbs against the defendant on account of 5,000*l.* the consideration for testator's share of the annuity of 744*l.*, or that he was ever privy to any retainer, deduction, or returning of any of the consideration-money, or to any agreement between defendant and Gibbs for that purpose, or that he ever *knew of or was privy to the settlement of account between Gibbs and the defendant, stated in Gibbs's affidavit.

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He added, that the annuity had been paid from June, 1818, to December, 1819, and he produced in Court for the inspection of the Judges an account book of the testator's, particularly referring to the page which contained the account of this transaction where a balance was struck by Howard and Gibbs ; and where, on the debtor-side, among other items concerning annuity payments, H. and G. debited the plaintiff with his full share of the consideration-money of this annuity

Gibbs swore, that in 1818 the defendant, by Robert Burton his agent, applied to Howard and Gibbs to raise money for him by way of annuity ; and that the defendant signed an agreement to pay an annuity of 3,960*l.*, for an advance of 33,000*l.*

That the Star Life Assurance Company advanced 20,000*l.* for an annuity of 2,400*l.* That 14,000*l.* more, which was actually raised, proving insufficient for the defendant's wants, 6,200*l.* more was advanced by the plaintiffs and others.

That this 6,200*l.* so paid and advanced by them to defendant by the hands of Gibbs for the purchase of the annuity of 744*l.*, was really and *bonâ fide* paid by Gibbs into the proper hands of the defendant in Bank of England notes, of the numbers and dates indorsed on the indenture containing the grant of annuity.

That previously to this payment Howard and Gibbs, as the agents of the defendant, had lent him considerable sums of money.

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That after the payment, a statement of accounts was made by the defendant and Gibbs, and upon that statement defendant was found justly indebted to Howard and Gibbs for money lent to and paid for the defendant by them as his agents, in the sum of 5,427*l.* 1*s.* 4*d.*, which sum the defendant thereupon paid to Gibbs. But *that no part of the 6,200*l.* was deducted or retained by either Howard or Gibbs.

Robert Burton swore that he was employed as the defendant's agent, and he and James Henry Mann, who were both present at the execution of the annuity deeds, swore that the 6,200*l.* was duly paid to the defendant, and that no part of it was with their privity, or to their knowledge, returned or paid by the defendant to Gibbs at the time of the execution of the indenture, after which they left the room.

The hearing of the case having been postponed from time to time on various accounts,

Vaughan, Pell, and Bosanquet, Serjts. this Term shewed cause against the rule at great length, and with considerable earnestness. The arguments, however, were in substance the same as those urged in the cases of *Williamson v. Goold*, (1 Bing. 234) and *Carroll v. Goold* (1 Bing. 190), and after the observations made upon the credit due to the various affidavits, amounted to this :

That under the Annuity Acts, an annuity ought not to be set aside on the ground of retainer or return of the consideration-money, unless that retainer or return was for the benefit of the grantee of the annuity. That there was no retainer in the present instance, and that the return, if any, was not to the grantees of the annuity, but to Howard and Gibbs ; but the rule sought to set aside the annuity on the ground of retainer only, and not of return.

That Howard and Gibbs were agents for the defendant in these transactions, and not for the plaintiffs ; and that, therefore, they ought not to be affected by the acts of Howard and Gibbs.

But that, even admitting Howard and Gibbs to have been the agents of the plaintiffs also, they were only agents under a

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limited authority and for a particular *purpose, and that the principals were responsible for the acts of their agents only while they acted within the scope of their authority for that particular purpose; that the retainer or return, if any took place, so far from being within the scope of the agent's authority in this case, was altogether inconsistent with its very nature; the authority being to transact a valid annuity, and the retainer or return having the effect of avoiding the very annuity which the authority was given to effect.

In the case of *Mootham v. How*,† it was holden that the retainer by the agent for his own expenses would not avoid the principal's annuity, and in principle that case was the same as the present.

The learned Serjeants urged the Court at all events to grant an issue on the subject, as there would be no appeal from their summary decision, and as the consequences of that decision would be fatal to many industrious persons who had embarked their property in the purchase of annuities.

Lawes and Peake, Serjts. were heard in support of the rule, and contended, that the plaintiffs ought themselves to have seen that the money was duly paid, and that not having done so, they were responsible for the acts of their agents.

The judgment of the Court was now delivered by—

PARK, J. :

These two cases are so similar in circumstances, and the questions arising out of the facts and circumstances of them are so much alike, that the Court are of opinion they may pronounce only one judgment, applicable to both, marking, however, as they proceed, such differences as exist between them.

Both the rules call upon the plaintiffs in each to shew cause why the annuities granted by Sir Thomas Champneys should not be set aside, and why the several deeds by which these annuities are secured should not be delivered up to be cancelled, upon the ground that a part of the consideration-money was retained; this ground is applicable to both: but in the case of

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† 7 Taunt. 596.

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Coventry v. Champneys there is another ground peculiar to itself, namely, that the memorial was defective, in not stating the names of the persons by whom that annuity was to be beneficially received, but omitting the plaintiff Coventry's name as one of such persons. There is another ground stated in both the rules, namely, for not stating the place of abode of the witnesses.

This latter ground has been properly abandoned by the counsel for the defendant, it not being possible to maintain that point here, after the decision of this Court in Michaelmas Term last in the case of *St. John v. Champneys*.†

Now what are the real facts applicable to both these cases, as deduced from the various affidavits, without going through all the minute circumstances of each? An enormous sum of money was wanted by this defendant, and he, by his own agent, Burton, applied to Howard and Gibbs to procure these various sums, and it is positively sworn and not denied, that besides 12*l.* per cent. as the amount of the annuity interest, the defendant was to pay the disgraceful commission of 9*l.* per cent. to these men, for effectuating this loan. And it is also sworn, that this sum with many others was retained at the very time by Howard and Gibbs, so that, without speaking of larger sums, there was in this transaction only about 800*l.* out of 6,200*l.* paid to the credit of Sir Thomas Champneys, the sum of 5,400*l.* being on *one pretence or other retained and kept back. All this is in effect admitted, because not denied, by him who alone could give the Court a full and clear explanation. No account is rendered, and although one of the learned counsel talked of an account, he knew perfectly well the Court could not, consistently with their duty, attend to such a statement, and his client knew full well, that if he could have rendered an account that would have borne inspection and scrutiny, he ought to have exhibited it to the Judge who administered the oath, and therefore the rule of law, *de non apparentibus*, &c. most strictly and imperiously applies. It is true, indeed, that Gibbs swears that the whole of the consideration-money was really and *bonâ fide* paid into the proper hands of Sir Thomas Champneys, and the witnesses to the deeds swear they saw the money paid, and none was returned in their presence.

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† 1 Bing. 77.

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But can the Court possibly wink so hard as not to see that all this is the machinery of these transactions? Witnesses to the deed are necessary, and to the receipt of the money: but as soon as they see the money laid down, and the deeds are executed, they leave the room. But why did they not stay? Why did they not wait and see Sir Thomas Champneys put it in his pocket and go away with it? Because there was a great after reckoning to take place, at which no human beings but Gibbs and Sir Thomas Champneys were to be present; when a secret transaction was to be arranged, which would not admit of any witness but the parties. Is it pretended that a moment's interval elapsed between the execution of the deeds and the payment or return of the money to Gibbs? The affidavit most guardedly swears, that after he had so paid the money (into the proper hands of Sir Thomas Champneys), that is, immediately, the account was settled; and 5,427*l.* were paid by Sir Thomas Champneys to this deponent. This *therefore, puts an end to all those supposed cases stated at the Bar, of the defendant having gone off with the money and settled at another time; and to which the general answer is, the Court looks to the circumstances of each particular case, as proved before them; and would ill discharge their duty, if, on the one side or the other, they were to act on supposition and not on proofs. We are therefore of opinion that these cases are made up of pretences and practices, which it was the object of the former and present statutes to put down, for now, nearly half a century, and that to shut their eyes against such practices as these, would open the door to the grossest frauds, would make every ignorant, young, or foolishly improvident person (in which latter description we class the defendant) a dupe or prey to the most nefarious practices. In stating this it will be seen that we do not run counter to the Court of King's Bench, or to former Judges of this Court, when they held, that this clause of the statutes under consideration is not imperative upon the Court to set aside annuities; that they will only do so wherever there is any thing of fraud, pretence, or practice, to keep back from the view of the Court the real truth of the transaction; but will not interfere where there is nothing but mistake, inadvertence, or where the case is clearly and satisfactorily explained, as it was in

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Cook v. Tower† in this Court, and in the King's Bench in *Barber v. Gameson*,‡ and in *Girdlestone v. Allan*.§ Supposing, therefore, that what has been done in this case had been done by the plaintiffs themselves; even their strenuous advocates have hardly ventured to deny, whatever may have been insinuated, that these are cases in which the Court ought to interfere: but it is said, the plaintiffs are perfectly innocent, they have denied *all privity or knowledge of any retaining or keeping back, and that if it was done, Howard and Gibbs, who are charged with having done so, were the agents of Sir Thomas Champneys, and, therefore, their misdemeanours must fall upon his head, and he must look to them; and they add, that these applications are not brought forward till Gorton is dead: this last point is only noticed by the way. If the charge had been, that Gorton himself had negotiated this business,—if he had been present when the money was paid, and could have given, if alive, any account of the transaction, it would have been for the Court to consider, whether they would have interfered, after the only witness, who could have explained the matter, had been removed by death: but this case, on the part of those who oppose the rule, proceeds entirely on the ground, that he could have given no explanation; and the length of time which has elapsed since the annuity was granted is not such as to create even that constructive limitation which the courts have sometimes been disposed to adopt.

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Before, then, we come to the law of the case, let us first see what is the fact of agency. Were Howard and Gibbs the agents of Sir Thomas Champneys or of the respective grantees of these annuities? Upon the affidavits the Court do not, and are confident that no unbiassed person, can entertain a doubt.

In this case it is satisfactory to draw the conclusion that such is the fact, from the affidavits filed on the part of the plaintiffs themselves. Burton, the former but now discarded agent of Sir Thomas Champneys, begins by stating that he was such, and that, as such agent, he on Sir Thomas's behalf applied to Howard and Gibbs. Gibbs swears in his affidavit, that Sir Thomas Champneys by or through Burton his agent in that behalf, and (for this is not all) a person acting generally in the

† 1 Taunt. 372.

‡ 4 B. & Ald. 281.

§ 1 B. & C. 61.

management of the affairs of the said Sir Thomas *Champneys, applied to this deponent and his partner to raise him a considerable sum, &c. Clearly, then, Burton was the agent of the defendant; he also negotiated the whole business for him, or Gibbs has sworn falsely, for he proceeds to swear, that after some negotiation between him, Gibbs, and Sir Thomas Champneys by or through Burton as such agent for the defendant, the agreement marked A was entered into. But it is said Howard and Gibbs were also his (Sir Thomas Champney's) agents: this is contradicted by all the facts, for they were most clearly the full authorized agents of both Coventry and Gorton, to transact all matters of annuity for them, not only in this, but in other business of the same nature. The Court are here assuming, what they wish to believe, that Coventry's affidavit is true, and that if Gorton had been alive he would have sworn the same thing. What, then, on Coventry's affidavit, is the fact? That he being a gentleman residing for the last 22 years in the town of Bedford, holding a place of great trust and confidence under Government, having long known and been acquainted with Howard and Gibbs, is not connected with them in pecuniary or other matters of business except as hereinbefore is mentioned, and matters of like nature. Now the matter before mentioned, being with respect to the purchase of an annuity, if there be any meaning in language, that must mean they had before been employed in negotiating annuities for him, nay, in the first part of the same affidavit, he states "that Howard and Gibbs were at that time possessed of a sum of money, which this deponent then, and for some time previous, had placed in their hands, which he (Coventry) intended to lay out by way of annuity." By whose agency was Coventry to lay out this money? surely by that of Howard and Gibbs; for he afterwards states that 1,200*l.* was about the balance of monies of him, Coventry, remaining in the hands of Howard and Gibbs, so that there was a running account *between these parties. If this does not constitute an agency in fact, and a most confidential agency too, the Court can hardly contemplate what state of facts will constitute such a relation.

But as we can have no affidavit from Gorton, how is the fact as to him upon the point of agency? much stronger: for the

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want of an affidavit is well supplied by the fact. In this case two books, which have never been out of the hands of one of the Judges of the Court, are referred to by the affidavits, and which were marked by the initials of my Lord Chief Justice, as exhibited before him, when the affidavits were sworn before his Lordship, and which therefore form a part of the case. Here then is a regular pass-book like a banker's, between Gorton and Howard and Gibbs for three or four years, respecting the purchase of annuities, with a regular debtor and creditor account; and without looking farther than the page in question and its correspondent credit-side, which the Court were obliged to look at, there are no less than two other annuities mentioned with this on the debit-side of the account and six other annuities on the credit-side all negotiated for Gorton by these persons; and, therefore, notwithstanding all that has been said, it would be absurd for the Court to shut their eyes against a body of evidence of the most strong and powerful nature. Still it is strenuously contended that if these men were the plaintiffs' agents, yet, they, the plaintiffs, having no benefit, no knowledge, no privity, cannot be answerable for this misconduct of the agents; and we are plainly told, that if we exercise power in this case we shall constitute ourselves a tribunal with greater powers than it ever was intended by law this Court should have. In answer to the last part of the observation, we have only to say, the Legislature has cast this power upon us, it is not of our own seeking. We cannot refuse to exercise it; and it has been most usefully exercised for the benefit of the country by the *courts of law ever since the first of the statutes passed, viz. ever since 1777. But it is said, the Act never meant to avoid and vacate an annuity on account of a retainer or keeping back by a mere stranger to the grantee, or a mere agent: it must be by some one under his influence. How does that observation apply to the present case? Howard and Gibbs were not strangers to the grantees: they were their avowed and confidential agents. The plaintiffs are living at a distance; they leave their monies in the hands of these men to manage and deal with as they please, but all in the purchase of annuities. They, (Howard and Gibbs,) in the very contract, are the only open and ostensible parties, and Sir Thomas Champ-

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neys contracts with them, to assure annuities to such persons as shall be nominated and appointed by Howard and Gibbs. And in another part of the affidavit the consideration money is to be subject to such deduction as therein is mentioned, and Sir Thomas Champneys is to grant two, three, or four separate annuities at the option of Howard and Gibbs. Now if persons will trust themselves and their concerns in the hands of such men, touching a particular business, where is the hardship of saying that they must be civilly responsible for the acts of such agents, in the course of that employment? But we have been pressed to grant an issue on the facts of the case. It is not denied that though the Court have the power of summary decision cast upon them, if upon the affidavits there are any involved and disputed facts, upon which the conscience of the Court cannot arrive at a satisfactory conclusion, they have also a power to send the case to the best tribunal for the development of contested facts, a jury of the country, for the satisfaction of their own minds. But are there any such difficulties in the facts here? In considering them, the Court has chiefly looked at the affidavits of the opponents of this application; and if the Court felt itself incompetent to the unravelling such a *case as this, they would be unfit to decide upon any summary application whatever.

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Then as to the law, where is the novelty of what is asked for? Why have none of these fearful consequences with which we are threatened if this rule be made absolute ever been apprehended, during the last fifty years, during all which time, the acts of the agent where they amounted to frauds, pretences, or practices, have been taken for granted as civilly affecting the principal, though the contrary has never been so sturdily contended for before? It is true the word "agent" is not to be found in either of the Acts of Parliament, and yet Lord Chancellor THURLOW first, and Lord LOUGHBOROUGH next, upon an appeal from Lord THURLOW, (and be it remembered Lord LOUGHBOROUGH was the author of the first of these statutes,) set aside an annuity, because the memorial did not set forth the name of the agent, which the Act does not mention, as well as the names of the witnesses which it does require. This was the case of *The Duke of Bolton v.*

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Williams.† And in *Dalmer v. Barnard*,‡ Lord KENYON adopts and approves that decision, and observes, that the parties there might have carried the matter to the House of Lords if the decree in Chancery in *The Duke of Bolton v. Williams* had given dissatisfaction. Why are these cases now mentioned? Because they prove, that all the transaction ought to be fully stated, and that the acts of the agent, though the word “agent” be not mentioned in the statute, ought to be before the Court. But why should his acts be before the Court if they could not influence the transaction? The Judges of other times thought it material to enquire into their acts; for the LORD CHANCELLOR said, “it was essential to the justice of the case, that the name of the agent as well as the principal should be set forth: why? that the whole *res gestæ* might appear *for the sake of a direction to every quarter from whence information may be collected:” and in the next sentence one may imagine that the present case was almost foreseen by his Lordship; “The Legislature foresaw that much mischief was done by effecting transactions of this kind in a private room, where the money was paid by an agent who received a large premium, while the person actually advancing the money was in an adjoining room; and if the agent’s name were not disclosed, so that recourse might be had to him to know what really passed, the truth could not be obtained, since in such case the principal not being present could not give the information.”

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The case of *Mootham v. How*§ is also of the strongest possible weight; and the causes we decided in last Michaelmas and Hilary Terms, of *Groom v. Sir Thomas Champneys*,|| and *Williamson v. Gould*,¶ are all to the same effect; and the Court think that if we did not put the construction we now do upon the Act of Parliament, parties would have the opportunity of doing the very thing that the statute meant to prohibit: and it would virtually operate as a repeal of the statute, for the parties would always take care never themselves to mix in the transaction; but though living at Bedford or any other place, by having such men to traffic with their money put it completely in their power to

† 2 Ves. Jr. 138.

‡ 7 T. R. 248, 249.

§ 7 Taunt. 596.

|| See *St. John v. Champneys*, 1

Bing. 77.

¶ 1 Bing. 234.

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commit the most nefarious frauds upon those improvident, foolish men, round whom, and to protect them against their own imprudence, nay, to save them from themselves, this Act was thrown as a strong and powerful guard: and all the beneficial and salutary objects of the statutes would be entirely frustrated by the narrow construction now contended for, and so vehemently and strenuously pressed upon us. Whether this be a remedial or a penal law, the Court need not discuss: but it is a law *to prevent and suppress frauds; and it is a clear and fundamental rule in construing statutes against frauds, that they are to be liberally and beneficially expounded; and in our best text-book this position is to be found, "that where the statute acts against the offender and inflicts a penalty, it is then to be construed strictly: but where it acts upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally." With these sentiments, and upon these principles, the Court are of opinion these annuities cannot be supported: and notwithstanding all the dreadful consequences with which such a decision is prognosticated to be followed, we think, on the other hand (and we have not come to this conclusion without much deliberation), that our decision upon this point will better accord with the object of the Legislature, and will be most subservient to the best interests of mankind.

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Rules absolute accordingly.

1823.
June 10.

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(1 Bing. 302—306; S. C. 8 Moore, 244; 1 L. J. C. P. 105.)

The defendant agreed to take an assignment of plaintiff's house and premises, without requiring lessor's title; that he would pay 2,300*l.* for it, and also the amount of goods, fixtures, and effects, and take possession of the house on or before September 29th; the plaintiff agreed to give up possession of the premises, effects, and stock by that day, to assign licences, to repair or allow for all damaged outside windows, and to clear rent, taxes, and outgoings to the day of quitting possession. The expenses of the agreement were to be paid by the parties in equal moieties; and either party not fulfilling all and every part, was to pay to the other 500*l.*, thereby settled and fixed as liquidated damages:

Held, that on breach of the agreement by omission to take an assignment, the defendant was liable to pay the whole 500*l.*; and that it was not a mere penalty to cover such damages as might be actually incurred.

ASSUMPSIT on the following agreement:

"This agreement, entered into this second day of August, 1822, between Michael Reilly, of Oxford Street, victualler, of the one part; and Edward Jones, of Tothill Street, of the other part: witnesseth, that in consideration of the sum of 2,300*l.*, the said Michael Reilly doth agree to sell unto the said Edward Jones, the lease of the house and premises situate, lying, and being the sign of the Delaware Arms, Oxford Street, aforesaid, as he holds the same, at the nett annual rent of 75*l.*, for the term of fourteen years and an half from Michaelmas day last; also his goods, fixtures, and effects, now on the said premises, and which he has a right to sell, at a fair valuation by two appraisers or their umpire; and his saleable stock in trade. Porter not exceeding twelve butts; ales, thirty barrels; wines, foreign and British spirits, and compounds, 150*l.*: to be valued by proper gaugers or their umpire. And the said Edward Jones doth agree to take an assignment of the said lease and *premises as above described, without requiring the lessor's title; and that he will pay unto

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† This case may still be an authority on the general ground on which it is put by DALLAS, Ch. J. But it will be observed that the opinion, suggested by the judgments of PARK, J. and BURROUGH, J. that the expression "liquidated damages" is conclusive, has been overruled by numerous

cases. See particularly *Magee v. Lavell* (1874) L. R. 9 C. P. 107, 43 L. J. C. P. 131. In British India the Indian Contract Act, s. 74, has abolished the distinction between "penalty" and "liquidated damages."—R. C.

the said Michael Reilly the sum of 2,300*l.* for the said lease, deducting the deposit of 50*l.* now paid; also the amount of goods, fixtures, effects, and stock, as aforesaid, together with the amount of the unexpired term of the licences; and take possession of the said house and premises, on or before the 29th day of September next: at which time, and upon payment therefore, he, the said Michael Reilly, doth agree to deliver up possession of all the said premises, and also the effects and stock; and to assign over good and sufficient licences; to repair or allow for all damaged outside windows; and to clear the rent, taxes, and outgoings, to the day of quitting possession. And, lastly, it is hereby agreed, that all law and other expenses of carrying this agreement into effect, shall be paid by the said parties in equal moieties; and that either of them not fulfilling all and every part, the party not fulfilling shall pay unto the other the sum of 500*l.* hereby settled and fixed as liquidated damages; the deposit now paid to be considered as part of the said damages in case of default made by the said Edward Jones, or returned in addition to the said damages in case of default being made by the said Michael Reilly. As witness our hands the day and year first above written.

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“ Witness,

“ JAMES SCRIVEN.

M. REILLY.

“ JOHN LANGDON.

E. JONES.”

Breach, that the defendant did not accept an assignment of the said lease, or take possession of the said house and premises, goods, fixtures, and effects, and stock in trade, on or before the 29th day of September next after the making of the agreement, or since.

At the Middlesex sittings after Michaelmas Term last, a verdict was found for the plaintiff for 50*l.*, with liberty *for him to move to increase it by 400*l.*, the balance of the liquidated sum for which the action was brought.

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Vaughan, Serjt. having accordingly obtained a rule *nisi* to that effect,

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Leas and *Lawes*, Serjts. now shewed cause :

Though the expression “liquidated damages” is employed in this agreement, yet, taking the whole agreement together, it must be considered that the 500*l.* was intended not for liquidated damages, but as a penalty; in which case the plaintiff would only be entitled to recover for the damage he actually sustained. This sum might have been considered as liquidated damages, if it had been stipulated as the security for the performance of a single act, *Barton v. Glover*;† but the rule is, that where a deed or agreement contains provisions for the performance of several things, and then a large sum is stated at the end to be paid upon the breach of performance, that must be considered as a penalty;‡ and its being called liquidated damages will not alter the case. If the rule were otherwise, a party might, in such a case, pay the whole sum for breach of any one of the most unimportant and trivial of the provisions in the agreement.

(DALLAS, Ch. J. : If the damage occasioned by breach of the most material provision amounted to more than the stipulated sum, could not the party refuse to pay more ?)

Where the sum is considered a penalty, there are cases in which he may pay more. In *Low v. Peers*,§ *Rolfe v. Peterson*,|| and *Fletcher v. Dyche*,¶ the stipulated sum was to secure the performance of a single act, and therefore those cases are distinguishable from the present. But in *Astley v. Weldon*,‡

[*305] *where the defendant agreed to pay a sum if he did not perform at the plaintiff's theatre, it was holden that the sum agreed on should be a security for the damages actually incurred by breach of the agreement; and that must be taken to have been what the parties meant on the present occasion. Though there may be no case where the expression “liquidated damages” has been held to operate merely as affixing a penalty for the security of actual damages; yet there is, on the other hand, no case in which the Court have con-

† 17 R. R. 601 (Holt, N. P. 43).

‡ *Astley v. Weldon*, 5 R. R. 618
(2 Bos. & P. 346, 353).

§ 4 Burr. 2229.

|| 2 Br. Parl. Cas. 437.

¶ 1 R. R. 414 (2 T. R. 32.)

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sidered themselves as tied down, and, by the employment of that expression, precluded under any circumstances from considering it equivalent only to the term "penalty." The statute of William, which enables a plaintiff to assign several breaches in an action on a bond conditioned with a penalty for the performance of several things, affords a strong reason for contending that the plaintiff ought, under an agreement for a sum stipulated by way of security, to recover only such damages as he has actually incurred; otherwise the statute would be nugatory, and the same sum must be paid for the breach of conditions of very different degrees of importance, which never could have been the intention of the parties.

DALLAS, Ch. J. :

In this case, on the construction of this agreement, I think the damages stipulated for are to be considered as liquidated damages, whatever may be the construction of other cases: but I avoid grounding my opinion on any of them, having a clear opinion upon the whole of this agreement taken together.

PARK, J. :

I think the plaintiff is entitled to recover the 500*l*. No case has been adduced, in which, after the parties have themselves employed the expression "liquidated damages," the Court has holden the plaintiff should not recover, on breach of the agreement, the sum named as stipulated damages. I will not say there is no such case; but looking at the agreement itself in the present instance, I found my opinion on what appears to be the clear intention of the parties. As to the particular case of *Astley v. Weldon*, I concur in the decision there given; but the agreement in that case contained no such expression as "liquidated damages." I do not admit the assumption, that the present is an agreement for the performance of several things; in substance it is for the performance of only one: the vendor was to leave, and the vendee was to take possession. The language which contains the stipulation for liquidated damages is exceedingly clear and precise, and even the 50*l*. paid down was to be considered as part. The decisions all

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concur in laying it down that the intentions of the parties ought to be pursued; and about those intentions there can be no doubt in the present instance.

BURROUGH, J. :

There is no case which has decided that the defendant shall not pay the whole sum, where the expression "liquidated damages" has been employed to designate the nature of the payment. In all the cases the question has been, what was meant by the parties; and great inconvenience would ensue from non-compliance with their intention on either side. The statute of William operates only in cases of penalty, and was passed to relieve the plaintiff, by enabling him to assign more breaches than one, which he could not do at common law; but it is begging the question to say that the sum mentioned in this agreement was meant as a penalty, and not as liquidated damages.

Rule absolute.

C. P. MICHAELMAS TERM.

THURTELL v. BEAUMONT.

(1 Bing. 339—341; S. C. 8 Moore, 612; 2 L. J. C. P. 4.)

In an action against an insurance company to recover a loss by fire, the defence being that the plaintiff himself had wilfully set fire to the premises, the Judge directed the jury, that in order to their finding a verdict against the plaintiff, they ought to be satisfied that the crime imputed to him was as fully proved as would justify them in finding him guilty on a criminal charge for the same offence: Held, that this direction was right.

In the same cause the Court refused to grant a rule *nisi* for a new trial on the ground that subsequently to a verdict for the plaintiff, the grand jury had found a bill against him and others for a conspiracy to defraud the insurance company in this very matter.

But on affidavits disclosing the conspiracy itself, and shewing that the defendant did not attain a knowledge of it till after the trial, so that the plaintiff's case was in effect a surprise on him, the Court granted a rule *nisi* for a new trial, on payment of costs.

ASSUMPSIT against the managing director of an insurance company to recover the value of goods alleged to have been destroyed by fire in the plaintiff's warehouse.

1823.

Nov. 10.

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v.
BEAUMONT.

At the trial before Park, J. at the London sittings after last Term, the defence set up was, that the plaintiff had wilfully set fire to the premises, or had caused them to be set fire to. Positive testimony was adduced, and inconsistencies were pointed out in the plaintiff's evidence tending to substantiate this charge. The learned Judge directed the jury, that before they gave a verdict against the plaintiff, it was their duty to be satisfied that the crime of wilfully setting fire to the premises was as clearly brought home to him in this action as would warrant their finding him guilty of the capital offence, if he had been tried before them on a criminal charge.

The jury found a verdict for the plaintiff in the sum of 1,913*l.*, the value of the goods which John Thurtell, a brother of the plaintiff, swore were on the premises at the time of the fire.

Taddy, Serjt. now moved for a new trial, on the ground, first, that the jury had been misdirected: he urged, that in order to discharge the defendant from *liability, it was not necessary the jury should entertain the same certainty with respect to the plaintiff's guilt as would justify them in convicting him on a criminal charge. In this case, as in any other, they would, without reference to the defence set up, be warranted in finding against the plaintiff if he failed to make out his case to their entire satisfaction; and that might happen in various ways, even though arson were never proved against him. For instance if the loss had been occasioned by negligence only, unaccompanied with guilt, the defendant would have been entitled to a verdict.

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But the Court were clearly of opinion that the direction was proper, and refused to grant a rule on this ground.

Another ground taken in support of the motion was an affidavit from the defendant, that the grand jury of Middlesex had found true bills against John and Thomas Thurtell and others, for a conspiracy to defraud the fire office in this very matter.

THURTELL v. PARK, J.:

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On this point I have looked into the books; I find many applications for new trials, on the ground of bills found by the grand jury, but none in which the application has succeeded. In one case, where the ground of the motion was, that a bill for perjury had been found against the principal witnesses, Lord MANSFIELD said, that the granting the rule for such a reason would have a most dangerous tendency, as it would open a door for constant scenes of perjury, and tempt a party to delay execution by indicting his adversary's witnesses. In *Warwick v. Bruce*,† Lord ELLENBOROUGH discharged, with costs, a rule to stay execution till after the trial of an indictment against the *plaintiff's witnesses for perjury: and in *Bartlett v. Pickersgill*,‡ in Lord HENLEY's time, a plaintiff having petitioned for leave to file a supplemental bill, because the defendant had, on the evidence of the plaintiff, been indicted and convicted for perjury on his answer to the original bill, Lord HENLEY dismissed the petition.

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DALLAS, Ch. J. referred to *Attorney-General v. Woodhead*,§ and

The rule prayed by *Taddy* was refused on this ground also.

Taddy, however, having produced affidavits from a respectable warehouse-man, and from Joseph Hunt, (who, together with John Thurtell, was a prisoner in Hertford gaol, on a charge of murder,) shewing that the plaintiff's demand had been supported by a tissue of unparalleled and audacious fraud, the circumstances attending which, although he vehemently suspected them, the defendant had no means of unravelling till after the trial, so that with regard to the plaintiff's case, he was in effect taken by surprise.

The COURT, on this ground, granted a rule *nisi* for a new trial, upon payment of costs.

Rule nisi accordingly.

† 4 M. & S. 140.

577, n.).

‡ 1 R. R. 1 (1 Cox, 15, 4 East,

§ 16 R. R. 744 (2 Price, 3).

SHERIFF *v.* JAMES.

(1 Bing. 341—343; S. C. 8 Moore, 334; 2 L. J. C. P. 5.)

An action on the case does not lie for detaining cattle distrained damage feasant where tender of sufficient amends was made after the cattle had been impounded.

1823.
Nov. 11.

[341]

THIS was an action on the case for detaining the plaintiff's cattle in pound after tender of sufficient amends. The declaration, which contained many counts, *stated in substance that the defendant had distrained and impounded the plaintiff's cattle, damage feasant, in a close of the defendant, and then went on to aver, that the plaintiff, after the impounding and as soon as he had notice of it, tendered and offered to the defendant, in satisfaction of the trespasses, a certain sum of money, to wit, the sum of 2s., the same being then and there sufficient amends for the trespasses, and for all matters for which the defendant had a right to detain the cattle; and then and there requested the defendant to deliver the said cattle to the plaintiff; and that it was then and there the duty of the said defendant to have accepted such amends as aforesaid, and to have delivered the said cattle to the plaintiff; yet the defendant, not regarding his duty, but contriving to aggrieve the plaintiff, refused to deliver the said cattle to the plaintiff, and wrongfully and maliciously demanded an excessive sum, by way of amends for the trespasses, to wit, the sum of 10s. 6d., and extortionately detained the cattle for the said trespasses, &c. At the trial before Hullock B., at last Monmouth Assizes, the plaintiff was nonsuited, the learned Baron being of opinion that this action did not lie.

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Peake, Serjt. now moved for a rule *nisi* to set aside this nonsuit and enter a verdict for the plaintiff, on the ground that if this action did not lie, the plaintiff would be without a remedy, as he could not succeed in replevin where the tender was made after the cattle had been impounded. The same point was raised in *Anscomb v. Shore*; † but that case was ultimately decided on another ground.

† 10 R. B. 686 (1 Camp. 285., 1 Taunt. 261) where it was holden where is indicated the course which a complainant may pursue.
such an action would not lie, and

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PARK, J. :

Where the alleged grievance is one which, like the present, must have occurred frequently, the circumstance that an action is of the first impression, affords a strong presumption against it. The Court are of opinion that the rule prayed for ought not to be granted. Such an action has never been permitted to succeed, and the *dicta* in the books are all against it.

BURROUGH, J. :

This is probably the invention of some young pleader, and never was thought of before.

DALLAS, Ch. J. concurring,

The rule was refused.

1823.
Nov. 11.
[344]

RICHARDSON v. BROWN.†

(1 Bing. 344 ; S. C. 8 Moore, 338 ; 2 L. J. C. P. 7.)

"To be sold, a black gelding, five years old ; has been constantly driven in the plough.—Warranted : " Held, that the warranty applied to soundness only.

THE plaintiff sued to recover the price of a horse, sold under the following warranty : "To be sold, a black gelding, five years old ; has been constantly driven in the plough.—Warranted."

At the trial before Park, J. at Guildhall, at the sitting after Trinity Term, 1823, the plaintiff having proved that the horse was sound, obtained a verdict for the price agreed upon.

Pell, Serjt. now moved to set aside the verdict, and enter a nonsuit, on the ground that the warranty referred to the horse's having constantly been driven in the plough, and that the plaintiff ought to have proved that circumstance.

But the Court thought the warranty applied only to soundness, although a little ambiguity might be occasioned by the structure of the sentence, and they refused the rule.

† *Budd v. Fairmauer* (1831) 8 Bing. 48, 53.

DOE, ON THE DEMISE OF EARL THANET AND OTHERS,
v. GARTHAM, CLERK.1823.
Nov. 14.

(1 Bing. 357—358; S. C. 8 Moore, 368; 2 L. J. C. P. 17.)

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Held, that the visitors and feoffees of a school who had dismissed the schoolmaster for misconduct, could not maintain ejectment for the schoolhouse till they had determined the master's interest in a regular way, by summoning him to appear before them.

THE lessors of the plaintiff were visitors and feoffees of a school at Skipton, of which the defendant was the schoolmaster; and for misconduct in his office he *had been dismissed by the lessors of the plaintiff, who, in this ejectment, sought to recover possession of the schoolhouse and its appurtenances. They had omitted, however, to summon the defendant before them previously to dismissal.

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At the York Lent Assizes, 1823, before Bayley, J. a verdict was found for the plaintiff, with leave for the defendant to enter a nonsuit, if the Court should be of opinion that the defendant ought to have been called before the visitors previous to their removing him from the school.

In Easter Term last a rule *nisi* to this effect having been obtained by *Peake*, Serjt.,

Vaughan, Serjt. now shewed cause; and upon the Court intimating that on the authority of *Rex v. Dr. Gaskin*,† the rule must be made absolute, *Vaughan* endeavoured to distinguish that case from the present; that, having been decided upon a return to a *mandamus*, and there being no premises, to which as in the present case the parties exercising their authority could make a legal title; and he cited *Baggs's* case.‡

But the Court were clear that the defendant having a freehold interest in his office of schoolmaster, the lessors of the plaintiff could not succeed in ejectment till they had determined that interest upon summons in the regular way.

Rule absolute.

† 4 R. R. 633 (8 T. R. 209).

‡ 11 Co. Rep. 93.

1823.
Nov. 19.

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NEAVE v. MOSS.

(1 Bing. 360—364; S. C. 8 Moore, 389; 2 L. J. C. P. 25.)

In 1784, a tenant for life, who had a power to lease for twenty-one years, leased for fifty-three years to defendant, who, in 1813, (nine years after the death of tenant for life,) underlet to plaintiff: ten years after the death of tenant for life, the remainderman, after giving to plaintiff and defendant notice to quit, granted plaintiff a new lease, and received the rent thereon for six years; at the end of which time defendant, who had acquiesced in the transaction during the interval, distrained on plaintiff for six years' rent: Held, that after this acquiescence, plaintiff might, in an action of replevin, plead *non tenuit* to defendant's avowry under the lease which plaintiff accepted from him in 1813.

By a marriage settlement, of October, 1771, the "Tumble-down-Dick," public-house, situated in Borough High Street, Southwark, was settled on John Mootham and his assigns for life, and after his decease on his intended wife and her assigns, for life, and after their deaths, on the children of the marriage (if two or more), in such shares as the husband and wife, during their joint lives, should appoint; and in default of such appointment on all the children, in equal shares, as tenants in common. There was a power for Mootham, during his life and for his wife, if she should survive him, to lease the premises, for any term not exceeding twenty-one years. The settlement was duly executed, and the marriage took place.

These premises, in November, 1784, John Mootham leased to John Darby, from Midsummer, 1784, for fifty-three years and a half, at 40*l.* a-year rent.

John Mootham died in 1804. By several mesne assignments the term granted by John Mootham to Darby became, in June, 1813, vested in John Ellis Clowes and James Western, in trust, to secure the payment of certain sums to certain persons named in the deed of trust; and upon payment of those sums, in trust, to assign the term to John Newberry.

John Newberry was at that time a partner in the firm of Meux & Co.; and upon payment of the sums specified in this last-mentioned deed, the term in question was assigned to Meux & Co. in January, 1821.

Meux & Co., however, had the management of the property in 1813; and on the 26th of November, in that year, by an agreement in writing, let the "Tumble-down-Dick" to Robert Neave, at 70*l.* a-year, with a stipulation from Neave, that he would purchase his beer of Meux & Co., and would not part with possession of the house or premises to any person whomsoever, without the previous consent of Meux & Co. Between 1813 and 1821 Neave and his wife both died, and at the time of the distress for which the present replevin was brought, the plaintiff (their daughter and executrix) carried on the business of the house.

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Up to Lady Day, 1815, Meux & Co. continued to pay to Mrs. Mootham the 40*l.* a-year, on the term granted by John Mootham to Darby.

In September, 1814, Mrs. Mootham gave Neave notice to quit at the ensuing Lady Day, or at the end of his current year, and served also a like notice on Meux & Co.: and in March, 1815, Mrs. Mootham demised the "Tumble-down-Dick" to Neave for twenty-one years, at 100*l.* a-year. This rent the Neaves paid to Mrs. Mootham and her assigns, from that time to the period of the present action; and after Lady Day, 1815, no rent was paid by Meux & Co., or any one else, in respect of the term of fifty-three years granted by John Mootham to Darby, nor did Meux & Co., although they continued to supply the "Tumble-down-Dick" with beer, enforce any demand against the Neaves for rent,—accruing on the term granted in 1813 by Meux & Co. to Neave,—till April, 1821, when they distrained for 190*l.*, being the balance of six years and a quarter's rent, due to them at Lady Day then last, in respect of the letting by them to Neave, after deducting 40*l.* a-year, which, in respect of the term of fifty-three years, granted by John Mootham to Darby, they were *willing to allow, out of the payments made by the Neaves to Mrs. Mootham and her assigns.

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Upon this distress the plaintiff sued out a replevin, and the defendant made cognisance as the bailiff of Meux & Co., for six years and a quarter's rent, due March 25th, 1821, by virtue of a demise, under which the Neaves successively held the premises, as tenants to Meux & Co., at a rent of 70*l.* a-year. The plaintiff

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pleaded, as to her father, mother, and herself respectively, *non tenuerunt* and *riens in arrear*. Upon which pleas issue was joined.

At the trial of the cause before the late Chief Baron Richards, at the last Lent Assizes for the county of Surrey, without letting the facts of the case go to the jury, a verdict was taken for the plaintiff, with liberty for the defendant to move to set it aside, and enter a verdict for the defendant instead.

Accordingly, in Easter Term last, *Lens*, Serjt. moved for a rule to this effect, on the ground, that in replevin the tenant could not be permitted to dispute his lessor's title, and that the Neaves having come in under a lease from Meux & Co. could not plead in bar of their avowry any thing short of a legal eviction: he relied on *Balls v. Westwood*.† A rule *nisi* having been granted,

Taddy, Serjt. now shewed cause :

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It appears clearly that John Mootham, who had a life-interest in the property, was only enabled, under the power conferred by the settlement, to grant a lease for twenty-one years. Instead of this, he grants a lease for fifty-three years, which, as against the person next in remainder, is absolutely void; and Mrs. Mootham was entitled to grant a new lease whenever she pleased, after the death of her *husband. Here, therefore, Neave's tenancy under Meux & Co. was determined, and a new tenancy commenced. In *Balls v. Westwood* the same tenancy continued up to the time of the action, and the lessor was never informed of a claim conflicting with his own title. But here, Meux & Co., who had full notice of the adverse claim, never instructed the Neaves to resist, nor did they themselves pay any rent upon the lease under which they now claim. A lessee is not permitted to shew that his lessor had no title, or a bad one, at the time of granting the lease, but he may shew that his lessor's title has determined.

Bosanquet, Serjt. in support of the rule, relied on the case of *Balls v. Westwood*, and on the principle, that in replevin a tenant cannot dispute his lessor's title. The plaintiff ought to

† 2 Camp. 11. [Overruled *Mountnoy v. Collier* (1853) 1 El. & Bl. 630, 22 L. J. Q. B. 124.—R.C.]

have disclaimed, and compelled the lessor to bring ejectment, in which case, the tenant being treated as a trespasser, might shew the determination of his lessor's title.

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PARK, J. :

I think the verdict in this case ought not to be disturbed ; and by so deciding, we shall not affect the case of *Balls v. Westwood*, which, in its circumstances, differs essentially from the present. It is perfectly true that a tenant cannot be permitted to impeach the validity of his landlord's title, but he may shew that it has expired ; especially under circumstances such as those we are now called on to consider. Mootham grants a lease, which, after several assignments, comes into the hand of Meux & Co., but turns out to be void. Meux & Co. underlet to Neave, but Mrs. Mootham, after the death of her husband, being then entitled to the property, gives both Meux and Neave notice to quit. The question is, whether Meux & Co. had not notice of the determination of the title under *which they claimed, especially as they so long acquiesced after that notice had been given. In *Balls v. Westwood*, Lord ELLENBOROUGH says, "Did you divest yourself of the possession you obtained under the plaintiff, and commence a fresh holding under another person?"

[*364]

Here, according to the language of that Judge, the Neaves did hold under another person, and paid rent for more than six years. This, too, was with the knowledge of Meux & Co., who were distinctly informed of the fact, and who, themselves, from the beginning of the six years, ceased to pay rent upon the title under which alone they could have any claim. All this time they continued to supply the Neaves with beer, and never thought of enforcing any demand under the lease upon which the defendant now makes cognizance. Their conduct amounts to a complete acquiescence in the adverse title, and the rule they have obtained must therefore be discharged.

BURROUGH, J. :

The verdict as it stands is perfectly right : it is true a tenant cannot be permitted to dispute his landlord's title ; but the question here, is, whether Meux & Co. have not by their con-

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duct relinquished all title. After the notice to quit served on them and on their tenant, after their continuing to supply him with beer, and omitting to demand rent for more than six years, it is impossible to contend that they did not acquiesce in the determination of their title. This acquiescence was taken as a matter of fact by the CHIEF BARON, and agreed in by the defendant's counsel, as appears from the circumstance of his omitting to go to the jury. The rule, therefore, must be

Discharged.

1823.
Nov. 26.
[378]

HOPCRAFT v. FERMOR.†

(1 Bing. 378—379; S. C. 8 Moore, 424; 2 L. J. C. P. 29.)

The Court will grant an attachment against a party for non-performance of an award which has been made a rule of Court, though he reside out of the jurisdiction of the Court.

TADDY, Serjt. had obtained a rule, calling on the defendant to shew cause why an attachment should not issue against him for non-performance of an award which had been made a rule of Court. After submission to arbitration, the defendant had gone to reside at Boulogne, in France, where a copy of the award and of the rule *nisi* for an attachment were served on him.

Pell, Serjt. who shewed cause against the rule, argued, that while the defendant lived out of the jurisdiction of the Court, he could not be guilty of a contempt; and that, therefore, the present motion was of the first impression. It was at all events an application to the discretion of the Court, who would not issue process where it would be altogether nugatory.

Taddy :

[*379] The party having been before the Court previously to his going abroad, is clearly in contempt for refusing to perform the award: if so, the plaintiff is entitled to the attachment *ex debito justitiæ*, for the *statute 9 Will. III. c. 15,† has enacted, that the party refusing to perform an award which has been made a rule of court, shall be liable to all the penalties of a suitor or defendant,

† For the modern practice in com- 1 Ch. at p. 259.

mittal and attachment, see Mr.
Lavie's note to *In re Evans* '93,

† See now Arbitration Act, 1889,
s. 12.

and process is never refused against a defendant on the ground of his being out of the kingdom. In the one case it may be convenient to have the process, in the other, the attachment, ready to serve in case the party should unexpectedly return.

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FERMOR.

The COURT took time to consider; and on this day, said the attachment might issue; adding, that it was in the nature of a civil process, and whether it could be served with effect or no, was not for the Court to enquire.

Rule absolute.

DODINGTON v. HUDSON.

(1 Bing. 384—388.)

1823.
Nov. 27.

[384]

A defendant having at the trial of an action on the case, agreed to enter into a rule of *nisi prius*, to repair and reinstate premises which he had wrongfully damaged, it was referred to a barrister to settle what sum should be paid in lieu of his doing this. The defendant's attorney produced no witnesses at the first meeting under the arbitration, of which he had had ample notice, but the plaintiff's witnesses gave in their estimate, and the arbitrator, after viewing the premises, appointed a day for a second meeting. The defendant's attorney called before that day, and said that his witnesses (two surveyors, who had known the premises before the action) could not attend; the arbitrator, although one of these witnesses might have attended the first meeting, appointed a third meeting for the evening before he was about to leave London for the circuit: on the morning of that day, defendant's attorney called on the arbitrator, and left an affidavit, stating that one of the two surveyors was confined to his bed, and the other gone to France. The arbitrator suggested that other surveyors were equally capable of making an estimate for the defendant, and offered, if the defendant's attorney would name a day, to come to London to hear them, or the two first proposed; the attorney refused to name a day, or to procure other surveyors, though another surveyor and a carpenter had attended the trial of the cause on defendant's behalf. The arbitrator then gave the defendant's attorney notice he should make his award if required by the plaintiff; and being required, awarded a sum to be paid to the plaintiff.

The defendant's attorney swearing he understood the arbitrator meant to have called another meeting, the Court set aside the award, though no objection was made to the amount awarded; leaving, however, the plaintiff at liberty to enforce the defendant's agreement to enter into the rule of *nisi prius* for the reinstating the premises.

UPON affidavit, this case appeared to be as follows. Action by a reversioner against the defendant for pulling down and damaging a certain dwelling-house, as set forth in the declaration.

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v.
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The cause was tried at the Surrey Summer Assizes, 1822, by a special jury, after a view ; and when the plaintiff's counsel was about to prove the damage done, the defendant's counsel proposed, that in the event of a verdict passing for the plaintiff, the damages should be repaired, and the plaintiff's premises reinstated by the defendant ; and two surveyors, (one on the part of *the plaintiff, and one on the part of the defendant,) were agreed upon by the respective counsel to direct the repairs and reinstatement, and the defendant was to enter into the necessary rule accordingly. A verdict having been found for the plaintiff,

The defendant, in Michaelmas Term, 1822, obtained a rule, calling on the plaintiff to shew cause why the verdict should not be set aside ; which rule was in Easter Term following discharged.

Defendant having refused to enter into the rule, as agreed upon at the trial, plaintiff, in Trinity Term, 1823, obtained a rule, calling on the defendant to shew cause why the defendant should not forthwith, at his own expense, reinstate the premises of the plaintiff, in respect of which the action was brought, and why the work necessary to be done should not be under the inspection of the two surveyors, or why the associate should not draw up a rule of Nisi Prius, so ordering, as agreed upon at the trial of the cause.

The defendant shewed cause against the rule, upon the affidavits of himself and his surveyor, that he could not comply with the agreement entered into upon the trial, without incurring penalties under the Building Act ; whereupon it was referred to a barrister, to settle and ascertain the amount of the damages to be paid by the defendant to the plaintiff or his attorney, for reinstating the premises of the plaintiff, in respect of which the action was brought, as agreed upon at the trial of the cause, and that the plaintiff should be at liberty to indorse such damages on the *postea*, instead of the nominal damages of 1s.

After due notice had been given to both parties, a meeting took place before the arbitrator, on the 23rd of June last, at which were present the plaintiff's attorney, two surveyors on his behalf, the defendant and the defendant's attorney ; all of them having first viewed the premises. The plaintiff's surveyors gave

in and substantiated *their estimate of the expense of reinstating the premises, when the defendant's attorney said he was not prepared with any witnesses, as he wished first to see on what footing the business was to proceed. The arbitrator then proposed to hear the defendant's witnesses the next day, but the defendant's attorney saying he should not be ready, the next meeting was fixed for the 26th of June.

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On the 24th of June the defendant's attorney stated that his witnesses could not attend on the 26th, when the arbitrator again postponed the next meeting till the evening of the 2nd of July, the day before he was about to leave London for the circuit. On the morning of the 2nd of July the defendant's attorney called on the arbitrator, and left an affidavit, stating that the defendant's witnesses, two surveyors, who had attended at the trial, and who knew the premises before the action was brought, could not attend; one of them, (Gwilt,) being confined to his bed by the gout, the other, I'Anson, being unavoidably absent from London, which he had quitted for France on the 24th of June.

The arbitrator then exhorted the defendant's attorney to procure other surveyors to make an estimate; but the attorney refusing to do this,—although Reed, another surveyor, and Robinson, a carpenter, had been present on behalf of defendant at the trial of the cause,—the arbitrator offered (if the defendant's attorney would fix a day) to return from the circuit, for the purpose of hearing Gwilt and I'Anson, or any other witnesses; but the defendant's attorney refused to fix any day. The arbitrator then requested the defendant's attorney to inform the plaintiff's attorney it would be useless for him to attend that evening, with a view to any further hearing of the case; but he also warned the defendant's attorney, that if the plaintiff's attorney chose to appear and insist on an award, he the arbitrator should feel himself bound to make one. The defendant's attorney *thereupon gave notice to the plaintiff's attorney, that he, the defendant's attorney, should not be prepared to attend the arbitrator that evening; when the plaintiff's attorney informed him, that he, the plaintiff's attorney, would attend and call for an award. This was done accordingly, and the arbitrator

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HUDSON. settled and awarded the damages to be paid by the defendant, at the sum estimated by the plaintiff's surveyors.

Taddy, Serjt. on a former day in this Term, upon an affidavit by the defendant's attorney, that after the interview of the morning of the 2nd of July he left the arbitrator fully and unequivocally satisfied and convinced, that the meeting which had been appointed for the evening could not take place,—that the arbitrator did not intend to make his award, without hearing the evidence of Gwilt and I'Anson,—and that a further appointment for hearing them would be made by the arbitrator—obtained a rule *nisi* for setting aside this award.

Peake, Serjt. now shewed cause against the rule, and urged, that, under the circumstances, the arbitrator was justified in making his award, as the defendant's attorney had evidently been endeavouring, by affected delay, to hold the plaintiff over the Long Vacation. It was obvious that other surveyors might have been found, equally capable of making an estimate for the defendant as Gwilt and I'Anson, especially Reed and Robinson, who were present at the trial: but if the Court should think otherwise, one surveyor would have answered the purpose as well as any greater number; and had the defendant's attorney been disposed to act fairly, I'Anson might have attended the arbitrator at the first meeting on the 23rd of June, as it did not appear he had quitted London till the 24th. It would be observed, too, that there was not the slightest insinuation that the arbitrator had settled the damages at too high an amount.

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The Court requested that the parties would again go before the arbitrator; but the defendant refusing to accede to this, they set aside the award, leaving the plaintiff at liberty to enforce against the defendant his agreement to enter into the rule of *Nisi Prius* for reinstating the premises.

Rule absolute.

C. P. HILARY TERM.

1824.
Jan. 27.EDWARDS *v.* BELL AND OTHERS.

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(1 Bing. 403—409; S. C. 8 Moore, 467; 2 L. J. C. P. 42.)

Where justification is pleaded to an action for defamation it is sufficient to justify the substance of the defamatory statement.

The declaration charged the defendant with publishing the following libel against the plaintiff, a dissenting minister. "A serious misunderstanding has recently taken place amongst the independent dissenters of Great Marlow and their pastor, in consequence of some personal invectives publicly thrown from the pulpit by the latter, against a young lady of distinguished merit and spotless reputation. We understand, however, that the matter is to be taken up seriously.—*Bucks Chronicle*."

The defendant pleaded that the plaintiff, whilst officiating as minister, published from a part of a chapel assigned to him as minister for the delivery of a sermon, to and in the presence of his congregation, of and concerning one M. F., a teacher of a certain Sunday school, the scandalous words following: "I have something to say, which I have thought of saying for some time, namely, the improper conduct of one of the female teachers, her name is Miss Fair; her conduct is a bad example and disgrace to the school; and if any of the children dare ask her to go home, she shall be turned out of the school, and never enter it again. Miss Fair does more harm than good;" and thereby gave great offence to divers of the dissenters, to wit, one — and one —, and occasioned a serious misunderstanding amongst the dissenters. Verdict for defendant: Held, upon motion to enter a verdict for plaintiff *non obstante veredicto*, that the plea was a sufficient answer to the libel charged.

CASE for a libel. The declaration, after an introductory statement, that the plaintiff was a pastor or minister of certain dissenters at Great Marlow, charged the defendant with having falsely, wickedly, and maliciously published of and concerning the plaintiff as such pastor, a libel to the tenor and effect following:

"A serious misunderstanding has recently taken place amongst the independent dissenters of Great Marlow and their pastor, in consequence of some personal invectives publicly thrown from the pulpit by the latter, against a young lady of distinguished merit and spotless reputation. We understand, however, that the matter is to be taken up seriously.—*Bucks Chronicle*."

The defendants, who were proprietors of the *Times* newspaper, pleaded, first, the general issue. Second, that before and at the

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time of the speaking and publishing the several scandalous words by the said *plaintiff, as hereinafter mentioned, one Margaret Fair did assist in the management and conduct of a certain Sunday school, and was a person of distinguished merit and spotless reputation, and that the plaintiff, well knowing the premises, before the several times of printing and publishing the several supposed libels by the defendants, as in the declaration mentioned, to wit, on the 6th of April, 1823, at Great Marlow aforesaid, just before his preaching and delivering a certain discourse or sermon, then and there by him, as such pastor or minister addressed and preached to a certain congregation of the said dissenters assembled for the purpose of (amongst other things) hearing the said discourse or sermon, in a certain chapel, and whilst he, the plaintiff, was officiating in the said chapel as pastor or minister, spoke and published from a certain part or station of the said chapel, assigned to him as pastor or minister for the preaching and delivery of the discourse or sermon, and to and in the presence of the congregation, of and concerning Margaret Fair these scandalous words following: "I have something to say which I have thought of saying for some time, namely, the improper conduct of one of the female teachers, her name is Miss Fair; her conduct is a bad example and disgrace to the school, and if any of the children dare ask her to go home, she shall be turned out of the school and never enter it again; Miss Fair does more harm than good;" and thereby then and there gave great offence to divers of the said dissenters, to wit, one Joseph Wright the elder, one Joseph Wright the younger, one Samuel Washbourn, one William Wright, one Sarah Puddifant, and one Ann Jaques, and occasioned a serious misunderstanding amongst the said dissenters in the declaration mentioned; wherefore the defendants did afterwards, to wit, at the several times when, &c. in the declaration mentioned, print and publish the supposed libels in the declaration mentioned, as they lawfully might, for the *cause aforesaid, which are the same printing and publishing the supposed libels in the declaration mentioned, and this they are ready to verify, &c. There were other pleas to the same effect, upon which issue was joined.

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At the trial before Burrough, J. London adjourned sittings after Trinity Term last, a verdict having been found for the plaintiff on the general issue, with 40*s.* damages, and for the defendants on the special pleas,

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Pell, Serjt. in the last Term obtained a rule *nisi*, to enter up a verdict for the plaintiff, notwithstanding the verdict found for the defendants on their special pleas, on the ground that the pleas were no answer to the charge in the declaration.

Vaughan and *Taddy*, Serjts. now shewed cause :

The plea supports in substance all that is stated in the alleged libel, and the plaintiff cannot recover unless he shows that the defendants' publication contained a wilful and malicious misrepresentation of the expressions used by the plaintiff. In *Lewis v. Clement*,† the defendant, in addition to stating the plaintiff's proceedings, characterised them with a heading of his own, "Shameful Conduct of an Attorney;" but here the libel simply charges the plaintiff with the fact of having employed personal invective, and the plea supports the charge by setting out the language used. This was the only course the defendants could take, for it would not have been permitted them, in general terms, to affirm the libel: *J'Anson v. Stuart*,‡ *Holmes v. Catesby*.§ It is sufficient if the words set out in the plea support the substance of the charge contained in the libel, *Woolnoth v. Meadows*,|| and those words clearly constitute personal invective.

Pell and *Peake*, Serjts. in support of the rule argued, that the words set forth in the plea made out a charge, differing in the following respects from that conveyed in the libel: First, it must be inferred from the libel, that, in consequence of what had occurred, a misunderstanding arose between the dissenting minister and his congregation; whereas, by the plea it is alleged that the misunderstanding existed only amongst the congregation, in consequence of what had occurred, and not between

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† 22 R. R. 530 (3 B. & Ald. 702). || 7 R. R. 742 (5 East, 463; 2 Smith,

‡ 1 R. R. 392 (1 T. R. 748). 28).

§ 1 Taunt. 543.

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them and their pastor. Secondly, it must be inferred from the libel that the invective in question was delivered from the pulpit in the course of a sermon, whereas, according to the plea, it was delivered previously to the sermon. Thirdly, the plea contains no notice or justification of the imputation conveyed by the last words of the libel, that the matter was to be taken up seriously. Those words are a gratuitous comment upon the occurrence by the editor, and fall within the objection raised in *Lewis v. Clement*. The case of *Woolnoth v. Meadows* turned on the accuracy of the words of the libel, and not on the precision requisite in a justification. Fourthly, the language employed by the plaintiff was not invective, but merely an objection to the course pursued by Miss Fair.

GIFFORD, Ch. J. :

This was a motion to enter up a verdict for the plaintiff in an action for a libel, notwithstanding a verdict found for the defendants, upon pleas justifying the libel. The plaintiff states himself to be the pastor or minister of certain dissenters, and, after the usual introductory matter, that he was of good character, and had never been guilty of the misconduct imputed to him, alleges, that the defendants, who are the proprietors of the *Times* newspaper, published a libel against him in these words :
“ A serious misunderstanding has recently taken place amongst the independent dissenters of Great Marlow and their pastor, in consequence *of some personal invectives publicly thrown from the pulpit by the latter against a young lady of distinguished merit and spotless reputation. We understand, however, that the matter is to be taken up seriously.—*Bucks Chronicle*.” Undoubtedly the gist and sting of the charge contained in these words, is, that the plaintiff, by pouring forth scandal and invective from the place usually devoted to moral and religious instruction, had occasioned a misunderstanding between himself and his congregation, and that the matter was to be taken up seriously. This is, indeed, a grave charge, but the defendants justify it as follows : “ That the plaintiff, just before the preaching and delivering a certain discourse or sermon by him as pastor or minister, addressed to a certain congregation of

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dissenters, assembled for the purpose of (amongst other things) hearing the said discourse or sermon in a certain chapel, and whilst he the plaintiff was officiating in the said chapel as pastor or minister, spoke and published, from a certain part or station of the said chapel assigned to him as pastor or minister for the preaching and delivery of the discourse or sermon, and to and in the presence of the congregation, of and concerning Margaret Fair; these scandalous words following: 'I have something to say which I have thought of saying for some time, namely the improper conduct of one of the female teachers, her name is Miss Fair, her conduct is a bad example and disgrace to the school; and if any of the children dare ask her to go home she shall be turned out of the school, and never enter it again. Miss Fair does more harm than good.'" And then they allege, that the plaintiff thereby gave great offence to divers of the dissenters, to wit, &c., and occasioned a serious misunderstanding amongst the said dissenters. Now the first objection to the strict relevancy of this justification is, that the charge in the libel implies an invective uttered by the plaintiff in the *course of a sermon. I do not understand the libel to convey any such meaning; not that it would make any great difference if the fact were so; but the charge is, that the plaintiff delivered personal invectives from the pulpit, and this is also the statement contained in the plea. Has the plaintiff then uttered personal invective? If I understand what is meant by personal invective, he could scarcely have employed stronger language for that purpose. "Her conduct is a bad example and disgrace to the school." And not content with that, he goes on to say, "Miss Fair does more harm than good." These expressions clearly constitute personal invective. It is true that the libel ascribed to the defendants in the declaration goes on to say, "It is understood the matter is to be taken up seriously;" but the gist of the libel is, the charging the plaintiff with having delivered invectives from the pulpit. It has also been urged that the allegation that "the matter was about to be taken up seriously," implies that charges were about to be preferred against the plaintiff by his congregation, and that the justification contains no answer to this part of the libel. I do not see

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that the allegation necessarily conveys any such meaning; it is only alleged as that which naturally followed upon the plaintiff's conduct on the occasion in question; and the charge on the subject of his conduct is substantially met and answered in the justification. It has further been objected, that the libel alleges a misunderstanding to have arisen between the pastor and his congregation, while the justification alleges the misunderstanding to have existed only amongst the congregation: but even in that respect the plea substantially supports the statement contained in the libel, and the rule which has been obtained for the plaintiff must, therefore, be discharged.

PARK, J.:

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The charge complained of in this declaration is, that the plaintiff had been guilty of pronouncing *a personal invective from the pulpit; and it would have been no answer if the defendants had merely reaffirmed this in the plea; they are therefore obliged to particularise, and they say, that the plaintiff, whilst officiating as minister, published from a part of a chapel assigned to him as minister for the delivery of a sermon, to and in the presence of his congregation, of and concerning one M. Fair, a teacher of a certain Sunday school, the scandalous words set forth in the sequel. It was not necessary for them to say that this took place in the course of a sermon; no such allegation was contained in the libel complained of; but the expressions they have particularised are clearly personal invective of a very serious cast. As to the allegation touching the misunderstanding between the congregation and their pastor, the gist of it has been completely met in the language of the plea, and the statement that the matter was to be taken up seriously, though part of the publication complained of, can scarcely be termed libellous.

BURROUGH, J.:

No person can use the pulpit for the purpose of invective against individuals, and the defendants were entitled to justify in this action, by shewing that what they had alleged against the

plaintiff in that respect was borne out in fact. In such a case it is sufficient if the substance of the libellous statement be justified; it is unnecessary to repeat every word which might have been the subject of the original comment. As much must be justified as meets the sting of the charge, and if anything be contained in a charge which does not add to the sting of it, that need not be justified. In the present case the defendants have in effect justified all they asserted in the libel complained of, and the rule must therefore be

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Discharged.

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1824.

Feb. 5.

(1 Bing. 433—445; S. C. 8 Moore, 546; 2 L. J. C. P. 93.)

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By indenture between S. F., senior, of the first part, S. F., junior, of the second part, and J. H. H. of the third part, it was agreed that S. F., senior, should retire from business, and S. F., junior and J. H. H. become partners; that the capital employed should be 36,000*l.*, 24,000*l.* of which S. F., senior should advance for S. F., junior, and 12,000*l.* was to be advanced by J. H. H. The deed then proceeded, "And whereas an account of all the debts of S. F., senior, in his business of merchant, has been this day taken, and the balance in his favour amounts to 38,033*l.*, and whereas it has been agreed by and between S. F., senior, S. F., junior, and J. H. H., that the whole of the debts and credits of S. F., senior, shall be received and paid by S. F., junior, and J. H. H., and that the balance of 38,033*l.* shall be accounted for and paid by them in manner hereinafter mentioned, and S. F., senior, by indenture, hath assigned the debts and credits to them; this indenture further witnesseth that it is agreed, that in consideration of 12,000*l.* paid to S. F., senior, by J. H. H., and for raising 24,000*l.*, as S. F., junior's share of the capital, the sum of 36,000*l.*, part of the 38,033*l.* is to be retained by S. F., junior, and J. H. H., and the remaining 2,033*l.* paid to S. F., senior, by instalments, at six, twelve, eighteen and twenty-four months; and if any of the debts shall prove bad, the loss shall be borne by S. F., junior, and J. H. H.:" Held, that this deed amounted to a covenant by S. F., junior, and J. H. H. to pay the debts due from S. F., senior, in his business, at the date of the indenture.

THE plaintiffs declared in covenant upon an indenture, which being set out on oyer, appeared to have been entered into on the 29th of April, 1808, between Simon Fraser of the first part, the

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Honourable Simon Fraser, grandson of the first-named Simon Fraser, of the second part, and James Henry Houstoun of the third part; and, after reciting that S. F. the grandfather, had for several years carried on the business of a general merchant, and that it had been then lately agreed between S. F. the grandfather, S. F. the grandson, and J. H. H., that S. F. the grandfather should retire from the business, and that S. F. the grandson and J. H. H. should become copartners therein upon the terms thereafter *mentioned, witnessed, that for effectuating the said agreement, and in consideration of the mutual trust and confidence which S. F. the grandson and J. H. H. had and reposed in each other, each of them, the said S. F. the grandson, and J. H. H., for himself, his heirs, executors and administrators, did covenant with the other of them, his executors and administrators, mutually by that indenture in manner following: (that is to say) that they S. F. the grandson and J. H. H. would become and remain co-partners as general merchants for the term of ten years, to be computed from the day of the date of that indenture, that the capital of the copartnership should consist of 36,000*l.*, 24,000*l.* of which should be advanced in manner thereafter mentioned, by S. F. the grandfather, as the proportion of S. F. the grandson, and 12,000*l.* should be advanced by J. H. H. in manner thereafter mentioned, as his proportion, and that the whole of the capital of the copartnership should remain in the business, and that neither of the copartners should, during the copartnership, be at liberty to draw out any part thereof: the indenture then proceeded, “And whereas an account of all the debts and credits of S. F. the grandfather, in his business of general merchant, hath been this day taken, and the balance in his favour amounts to 38,039*l.* 3*s.* 5*d.*; and whereas it hath been agreed, by and between S. F. the grandfather, S. F. the grandson, and J. H. H., that the whole of the said debts and credits of S. F. the grandfather shall be received and paid by S. F. the grandson, and J. H. H.; that the balance of 38,039*l.* 3*s.* 5*d.* shall be accounted for and paid by them in manner hereinafter mentioned; and that for the better enabling them to call in, collect, and receive such credits, S. F. the grandfather, by an indenture of assignment, bearing even

date with that indenture, hath assigned the same unto S. F. the grandson and J. H. H. ;” and then further witnessed, that it was thereby agreed, by and *between S. F. the grandfather, S. F. the grandson, and J. H. H., that, in consideration of 12,000*l.* unto him, S. F. the grandfather, in hand paid by J. H. H., as his share of the capital, and for raising 24,000*l.*, the proportion of S. F. the grandson, of such capital, the sum of 36,000*l.*, part of the sum of 38,033*l.* 3*s.* 5*d.*, the balance of the debts and credits of S. F. the grandfather, should be retained and kept by them, S. F. the grandson and J. H. H., as their capital or joint stock, and should belong to them in the following proportions, (that is to say) 24,000*l.*, part thereof, to S. F. the grandson, and 12,000*l.*, the residue thereof, to J. H. H. ; and it was also further agreed between S. F. the grandfather, S. F. the grandson, and J. H. H., that 2,033*l.* 3*s.* 5*d.* being the remainder of the balance of the debts and credits of S. F. the grandfather, should be paid by S. F. the grandson and J. H. H., unto S. F. the grandfather, his executors, administrators, or assigns, by equal instalments, at the end of six, twelve, eighteen, and twenty-four months from the date of that indenture, but without interest ; and it was thereby further agreed and declared between the parties thereto, that in case any of the debts so assigned to S. F. the grandson, and J. H. H., by S. F. the grandfather, should thereafter prove bad and not recoverable, the loss should be borne by S. F. the grandson and J. H. H. ; and it was thereby agreed between the copartners, that the joint trade or business should be carried on under the name and firm of “The Honourable Simon Fraser and Company,” and that each of them and their respective executors and administrators, should during the copartnership, and at the determination thereof, have and enjoy a several share and right, title, and interest of, in, and to the said joint stock, and all profits arising therefrom, in the proportion following: S. F. the grandson in and to two-third parts thereof, and J. H. H. in and to one-third part thereof, *and should and might accordingly, upon or at the end of the copartnership, receive and take his and their respective parts, shares, and proportions of the joint stock and profits to his and their own use, without any benefit of survivorship :

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HOUSTOUN. then followed the detailed stipulations usual in copartnership deeds, as to the mode in which the partnership concerns should be conducted.

The second count of the declaration, in addition to the indenture just described, set out another of the same date, by which Simon Fraser the grandfather assigned and transferred to Simon Fraser the grandson, and James Henry Houstoun, all and every the debts due to Simon Fraser the grandfather, referred to in the above-mentioned deed, and specified in a schedule appended to the deed of assignment, and then averred that there were no deeds, instruments, or writings between the parties, in regard to the matters in the two indentures mentioned, save the two indentures, and that they contained the whole of the agreement between the parties, relative to the debts and credits of Simon Fraser the grandfather. Both counts of the declaration, after alleging a covenant by James Henry Houstoun and Simon Fraser the grandson, to pay the debts of Simon Fraser the grandfather, and averring the death of James Henry Houstoun, and of Simon Fraser the grandson, assigned for a breach, that Simon Fraser the grandson and James Henry Houstoun, in their respective lifetimes, and James Henry Houstoun in his lifetime, after the death of Simon Fraser the grandson, whom he survived, and the defendants' executrix and executors as aforesaid, had not, nor had any or either of them, paid the debts of Simon Fraser the grandfather, owing by him in his business of a general merchant, on the 29th of April, 1808; and that in default thereof, the plaintiffs, as executrix and executors as aforesaid, had paid in respect of those debts 10,051*l.* 15*s.* 8*d.* Demurrer and joinder.

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Taddy, Serjt. in support of the demurrer :

It may be admitted that where the intention of parties is clear, a covenant may be collected from any part of a deed, and may be couched in any form of expression. Here, neither in the situation of the parties, nor in the language of the deed, can any intention or covenant be collected that the defendants or the intestate were to pay the debts of Simon Fraser the grandfather : not in the situation of the parties, for it would be absurd to

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suppose that Houstoun, who was interested only to the amount of a third in the partnership concern, should take upon himself a liability to the extent of all the debts contracted previously to his becoming a partner;—not in the language of the deed, because there is no express covenant for any such liability, no time specified within which the debts are to be paid, nor any expression from which it can be inferred that Houstoun has rendered himself responsible to such an extent. The language of the recital refers to a past time, and to another and separate parol agreement. It is quite consistent with the language of the deed and the declaration, that the grandfather's debts might have been paid under the provisions of this parol agreement; and as the rest of the deed contains *verba de presenti*, for instance, as to the covenant to pay the grandfather 2,033*l.*, the recital neither can be nor was intended to be available for the purposes of the present action. A mere recital of a debt under seal will not make it a specialty, *Lacon v. Mertins*,[†] and although it should be collected from the recitals that the defendant was to pay, yet it is nowhere provided by this deed that he shall do so: there might have been a prior separate agreement for the payment of those debts, although the declaration avers that there was none at the time of the execution of the indentures besides *what was contained in the indentures, and in such a case the recital will not constitute a covenant: *Geary v. Read*,[‡] *Montague v. Bath*.§

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D'Oyly, Serjt. for the plaintiff:

Where it can be understood from the deed to have been the intention of the party to bind himself by any agreement; a covenant may be collected from the whole of the deed taken together, or from any form of expression in any part of it. The cases to this effect are almost innumerable, but the following may be particularly noticed: *Deering v. Farrington*,|| *Russell v. Gulwell*,¶ *Pordage v. Cole*,†† *Brice v. Carre*,‡‡ *Seddon v. Senate*.§§

† 1 Ves. Sen. 312.

¶ Cro. Eliz. 657.

‡ 1 Roll. Abr. Covenant, C. Cro.

†† 1 Saund. 319.

Car. 128.

‡‡ 1 Levinz, 47.

§ 3 Cha. Cas. 101.

§§ 12 R. R. 299 (13 East, 63).

|| 1 Mod. 113.

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Duke of St. Albans v. Ellis.† Year Book, 14 Hen. VIII. 15.

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Further than this, the Courts have gone great lengths in extracting and eliciting covenants from the various parts of a deed, where perhaps the parties were not aware that they were subjecting themselves to an action of covenant; as in the obvious instances of the construction put on the words *dedi, demisi, concessi*; and this applies to the argument, that the part of the deed from which it is sought to charge the present defendant is in the past tense. That it was the intention of the parties that the defendant should be so liable there can scarcely be any doubt, for why should Simon Fraser the grandfather assign all his credits to the defendant and his partner, if these latter were not to give something in the shape of an equivalent, by discharging the debts? As to the proportions in which they should respectively do this, and the amounts of their several interests, that was a matter of arrangement between themselves, with which *the grandfather had nothing to do. With respect to the covenant being extracted from the recital, there are many cases in which it has been expressly determined that the language of a recital may constitute a covenant: *Severn v. Clark*,‡ *Graves v. White*,§ *Hollis v. Carr*,|| *Barfoot v. Freswell*.¶ The rules of pleading are more strict than the construction of deeds, because in pleading the parties are adverse, and yet many of the most material averments in pleading come under a “whereas;” as in trespass, case for an escape, &c. The present is one entire transaction, the whole of which may be collected from the deed, and where that is the case it is not allowable to go into extrinsic evidence to shew another agreement on the same subject: *Meres v. Ansell*,†† *Meyer v. Everth*,‡‡ *Old v. Kay*.§§ In *Geary v. Read* the words which it was sought to construe as a covenant were merely a condition and limitation of a lease. *Lacon v. Mertins* only decided that the recital of a debt in an indenture does not make it a specialty; and *Montague v. Bath* turned on the effect of a recital which misrecited a deed and a will.

† 14 R. R. 361 (16 East, 352).

‡ 2 Leon. 122.

§ 1 Eq. Cas. Abr. Portions.

|| 2 Mod. 87.

¶ 3 Keb. 465.

†† 3 Wils. 275.

‡‡ 15 R. R. 722 (4 Camp. 22).

§§ K. B. Hil. T. 1824, not reported.

Taddy having replied,

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LORD GIFFORD, Ch. J. delivered judgment :

This is an action of covenant by the executrix and executors of Simon Fraser, against the representatives of James Henry Houstoun. The declaration, after setting out a deed between Simon Fraser, described as the grandfather on the first part, Simon Fraser, the grandson, on the second part, and James Henry Houstoun on the third part, alleges a covenant, by which Simon Fraser the grandson, and James Henry *Houstoun, did thereby for themselves, their executors and administrators, covenant, promise, and agree to, and with the said Simon Fraser the grandfather, amongst other things, in manner following, that is to say, that the whole of the debts and credits of the said Simon Fraser the grandfather should be received and paid by them, the said Simon Fraser the grandson and James Henry Houstoun; it then states the death of James Henry Houstoun and the breach of this covenant. The second count differs from the first only in setting out the deed, by which Simon Fraser the grandfather assigned his credits to Simon Fraser the grandson and James Henry Houstoun. To this declaration, the defendants, after having the deed set out on oyer, demur, and the question is, whether upon the whole of the deed the Court can collect, on the part of Simon Fraser the grandson and James Henry Houstoun, the covenant with which they are charged. It is admitted, that, in order to constitute a covenant, it is not necessary the word "covenant" should be expressly employed, and if it were necessary to refer to cases in support of so clear a position, I might mention *Stevinson's* case.† There, in debt upon bond, the condition was, that whereas the plaintiff had covenanted with the defendant, that it should be lawful for the defendant to cut down wood for fire-boot and hedge-boot, without making any waste or cutting more than necessary; and the plaintiff assigned the breach in that covenant, that the defendant had committed waste in felling wood, &c. and the condition was to perform all covenants and agreements; and exception was

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† 1 Leon 324.

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taken, because that the condition ought to extend but unto covenants to be performed on the part of the lessee; yet the exception was not allowed, **"for it is the agreement of the lessee, although it be the covenant of the lessor."*

The same principle was laid down in *Hollis v. Carr*, where FINCH, L. C. says, "there are many cases where words will make a covenant because of the agreement, when the general words of "covenant, grant," &c. are wanting: as, "yielding and paying" will make a covenant. And he held, that articles of agreement reciting an intended marriage, covenanting to settle a jointure in consideration of a marriage portion, and concluding thus, "and it is hereby agreed that a fine shall be levied to secure the payment of the said portion," amounted to a covenant to levy the fine. In order, therefore, to decide the present case, we must look with great accuracy to the instrument before the Court, to see what are the expressions which have been employed by the parties, and what those expressions will include. It appears that the business of a merchant had been carried on to a great extent by Simon Fraser the grandfather. It was agreed that he should retire; that Simon Fraser the grandson and James Henry Houstoun should carry on the business as partners; and that a capital should be advanced for this business in the manner mentioned in the deed; and then comes that part of the instrument on which the present question turns, "And whereas an account of all the debts and credits of S. F. the grandfather, in his business of general merchant, hath been this day taken, and the balance in his favour amounts to 38,033*l.* 3*s.* 5*d.*; and whereas it hath been agreed by and between S. F. the grandfather, S. F. the grandson, and J. H. H., that the whole of the said debts and credits of S. F. the grandfather shall be received and paid by S. F. the grandson and J. H. H., and that the balance 38,033*l.* 3*s.* 5*d.* shall be accounted for and paid by them in manner hereinafter mentioned; and that for the better enabling *them to call in, collect, and receive such credits, S. F. the grandfather, by an indenture of assignment bearing even date with these presents," (this indenture is set out in the second count, and appears to be a deed of transfer to Simon Fraser the grandson and James Henry

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Houstoun, of debts due to Simon Fraser the grandfather,) “hath assigned the same unto S. F. the grandson, and J. H. H. Now this indenture further witnesseth, that it is hereby agreed by and between S. F. the grandfather, S. F. the grandson, and J. H. H., that in consideration of 12,000*l.* unto him, S. F. the grandfather, in hand paid by J. H. H. as his share of the capital, and for raising 24,000*l.* the proportion of S. F. the grandson, of such capital, the sum of 36,000*l.*, part of the sum of 38,039*l.* 8*s.* 5*d.*, the balance of the debts and credits of S. F. the grandfather, shall be retained and kept by them, S. F. the grandson and J. H. H., as their capital or joint stock, and shall belong to them in the following proportions, (that is to say,) 24,000*l.* part thereof to S. F. the grandson, and 12,000*l.* the residue thereof to J. H. H.; and it is also further agreed between S. F. the grandfather, S. F. the grandson, and J. H. H., that 2,039*l.* 8*s.* 5*d.* being the remainder of the balance of the debts and credits of S. F. the grandfather, shall be paid by S. F. the grandson and J. H. H., unto S. F. the grandfather, his executors, administrators, or assigns, by equal instalments at the end of six, twelve, eighteen, and twenty-four months from the date of these presents, but without interest; and it is hereby further agreed and declared between the parties hereto, that in case any of the debts so assigned to S. F. the grandson and J. H. H., by S. F. the grandfather, shall hereafter prove bad and not recoverable, the loss shall be borne by S. F. the grandson and J. H. H.” The deed contains many provisions which do not bear on the present question, but relate to the mode in which the business was to be *carried on. Now, what was the object which the parties had in view by this instrument? The elder Fraser, who was about to retire from business, engages to relinquish it to the younger Fraser and Houstoun, and he relinquishes it without a stipulation for any compensation; a balance is struck, and it is found that there is due to him a sum of more than 38,000*l.* He says in effect, I will assign all this, you shall take both credits and debts, and account to me for the whole in a manner pointed out by the deed; Houstoun shall advance 12,000*l.* towards the capital to be employed in carrying on the business, and 24,000*l.* out of the balance due to me shall remain in it on the part of

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Simon Fraser the younger. Then, as many of the credits might turn out unproductive, there is an express provision, that the loss, if any, should fall on the two partners, that is, that it should come into the general account of the trade, and that the balance of 2,033*l.* should be accounted for to the grandfather. There is nothing unreasonable, that after the grandfather had assigned all the credits, the partners should take upon themselves the discharge of all the debts; but whether unreasonable or not, they take this upon themselves by express provision, and not under a mere recital, as it has been contended on the part of the defendant. The deed states, "it has been agreed that the whole of the debts and credits of Simon Fraser the grandfather, shall be received and paid by Simon Fraser the grandson and James Henry Houstoun;" and there is an express covenant, that they shall pay to the grandfather the balance of 2,033*l.* For the defendant, it is contended that this passage is a mere recital of a separate parol agreement, according to the terms of which it had been agreed the debts should be paid; and that, although this supposed recital might perhaps furnish evidence in support of another action, it does not amount to any stipulation by which Houstoun *rendered himself liable to the debts under the instrument now put in suit. The Court, however, must look at the whole of this instrument, and if they find it contains a clear agreement to do any act, whether in the way of covenant, provision, or even exception, then it is clear that an action of covenant may be maintained on the instrument. So looking at this instrument, and considering the nature of the subject-matter, we think there is that which amounts to the covenant which has been correctly stated in the declaration, and that the plaintiffs are entitled to recover.

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PARK, J. :

No one can read the words "And whereas an account of all the debts and credits of the said S. F. the grandfather, in his said trade or business of a general merchant, hath been this day taken, and the balance in favour of the said S. F. the grandfather amounts to the sum of 98,033*l.* 3*s.* 5*d.* And whereas it has been agreed by and between the said S. F. the grandfather,

and S. F. the grandson, and J. H. H., that the whole of the said debts and credits of the said S. F. the grandfather shall be received and paid by the said S. F. the grandson and J. H. H., and that the said balance of 38,033*l.* 3*s.* 5*d.* shall be accounted for and paid by them in manner hereinafter mentioned ;” and have any doubt that it was the intention of the parties that Simon Fraser the grandson and James Henry Houstoun should pay the debts of Simon Fraser the grandfather. If we were to hold otherwise, they would receive all the credits, and yet be under no obligation to furnish any consideration for such a benefit. As to the argument, that it would be a hardship that a partner who is benefited only to the extent of a third, should pay all the debts, that is a hardship which applies to all cases of partnership, and is a matter which the partners must *arrange among themselves, but which cannot affect the claim on the part of the grandfather.

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BURROUGH, J. :

The agreement which appears in the language of the deed, must have been entered into after the account of the grandfather's concerns had been taken ; why are we to presume a separate and independent parol agreement unconnected with this ? The whole was one transaction, and it must be intended that the agreement specified in the deed with respect to the payment of the debts was part of that transaction, and equally binding on the parties as all the rest of it.

Judgment for the plaintiff.

1824.
Feb. 7.

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ROBERTSON v. CLARKE.†

(1 Bing. 445—451; S. C. 8 Moore, 622; 2 L. J. C. P. 71.)

Where a ship was so shattered in a storm that upon survey it was found the expence of repairing her would far exceed her original value, and the captain having sold her *bond fide* for the benefit of all concerned, the purchaser shortly afterwards broke her up: Held, that this was such an urgent necessity as justified the sale.

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THIS was an action on two policies of insurance. The first was dated 25th of January, 1820, and was effected on the ship *Neptune*, valued at 8,000*l.*, for a voyage “at and from London to New South Wales and Van Diemen’s Land, the East Indies, East India islands, Persia, and elsewhere, with liberty to touch and call at all ports and places on this or the other side of the Cape of Good Hope, until her arrival at her final port of discharge in Europe.” The second policy was on the freight of the ship *Neptune*; it was dated on the 16th of January, 1821, and was effected for the sum of 4,000*l.*, the risk commencing “at and from the termination of her outward voyage at New South Wales and Van Diemen’s *Land, to her ports of discharge and loading in India, the East Indian islands, and during her stay and loading there, to her final port of discharge in Europe.” The cause was tried before Burrough, J. at Guildhall, when the plaintiff called several witnesses, from whose testimony it appeared that the *Neptune* sailed from England in the beginning of 1820, with convicts for New South Wales, having previously undergone a survey by the Government officers appointed for that purpose. She performed her outward voyage well, and having discharged her convicts, she sailed to Surabaya, where she took in a cargo of rice, which she carried to the island of Mauritius, where she discharged the cargo, and was unloaded to her very keel. The rice was found to be perfectly free from damage, and on a survey being had, the ship’s bottom was found to be quite dry, and in every respect the vessel appeared sound and seaworthy. Having taken in a cargo at the island of

† Cited in judgment of the Judicial Committee in *Cosseman v. West* (1887) 13 App. Cas. 160, 176; 57 L. J. P. C. 17, 24.—R. C.

ROBERTSON
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Mauritius, she set sail for Europe; at the time of her making land at Algoa Bay, the weather became very bad, and after that period she encountered a gale, which continued incessantly until she arrived at Symond's Bay. When she neared that port she was in such a state that the captain was obliged to fire guns of distress, in consequence of which the inhabitants sent out assistance, and the ship was brought into port. She was immediately surveyed, but the extent of her damage could not be ascertained, as she had a full cargo on board. She was therefore unloaded, and surveyed a second time, when the surveyors, among whom was an agent of Lloyds, upon the captain's applying for advice, recommended that she should be sold, as the expence of repairing her would much exceed her original value. The captain, acting under this advice, and being ignorant of the insurance effected on her, sold the ship and some part of the cargo which had been damaged, for about 1,100*l.*, *and having transhipped the remainder, he returned to Europe. No estimate of the expence of repairing was given in evidence; but it was proved that the persons who had bought the vessel on speculation had, after a month, brought her round to Table Bay, where she could have been completely repaired, but finding that course to be unadvisable on account of the damage she had sustained, they broke her up. The defendant contended at the trial that the captain ought to have repaired at any expence less than the value insured, and that he was entitled to a verdict on the second policy, as the island of the Mauritius was not an Indian island within the terms of the insurance. To support the latter part of the defence, he called a witness from the East India House, who said he apprehended that in physical geography, the Mauritius must be considered as an African island belonging to the Madagascar Archipelago. The plaintiff's witnesses had previously, on cross-examination, stated that it was generally considered as an Indian island. The learned Judge left it to the jury to say whether they thought the captain justified in selling the vessel under the circumstances which had been proved, and told them, that if they thought the sale a matter of necessity they must find for the plaintiff. He also left them to consider of the evidence which

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ROBERTSON had been offered relative to the Mauritius being, or not, an
v. Indian island.
CLARKE.

The jury returned a general verdict for the plaintiff.

Vaughan, Serjt. on a former day, had obtained a rule to shew cause why that verdict should not be set aside and a new trial granted, on the two objections taken at the trial.

Pell, Serjt. now shewed cause against the rule :

[*448] There is one distinction between the circumstances of this case *and those on which the defendant will rely : in all the other cases, the vessel, after having been sold, has been repaired by the purchasers, and has afterwards brought a full cargo home, while in this case, the purchasers, after having taken the trouble of getting the ship round to Table Bay, found the attempt to repair her impracticable, and broke her up. The captain, too, effected the sale in ignorance of the vessel being insured, and he therefore acted as he conceived for the benefit of his owners, whom he believed to be the only persons interested. Upon these facts, it is clear that the sale was *bonâ fide*, and was the result of extreme necessity. As to the objection respecting the situation of the island of Mauritius, the only witness called for the defendant apprehended the island must be considered in physical geography to belong to Africa, and to form part of the Madagascar Archipelago. To oppose this, there was the evidence of the plaintiff's witnesses, who stated that it was always considered as an Indian island, and that general reputation is supported by the testimony of several authors. In Mallam's Naval Gazetteer it is described thus, "Mauritius, an island in the East Indian Ocean." In Crutwell's Gazetteer, "France, Isle of, an island in the Indian Ocean." In Walker's Gazetteer it is described in the same manner ; and in Brooks's Gazetteer it is described as, "Mauritius, an island in the Indian Ocean, 400 miles east of Madagascar." All these authors support the testimony given at the trial that it is an Indian island.

Vaughan and *Taddy*, Serjts. in support of the rule :

As to the sale, the only justification for such a proceeding, is the extreme and absolute necessity of the case. Now that

necessity did not exist in the present instance, for the ship could have been repaired at the Cape. It was stated that the expence of repair would have exceeded her value; but if the plaintiff chose to value his *vessel in the policy at 8,000*l.*, he was bound by that valuation, and should have repaired her at any cost less than that sum. He might then have claimed his loss from the underwriters, as the policy was a contract of indemnity; instead of which he put an end to the risk, claimed for a total loss, and materially altered the nature of the contract. From the language of DALLAS, Ch. J., in *Read v. Bonham*,† from the case of *Idle v. The Royal Exchange Assurance*,‡ and many other cases, it is clear that nothing but extreme necessity can justify the sale of the ship. It is not enough that the sale is made honestly and with a good intention. As to the authorities cited to prove the Mauritius to be an Indian island, they are opposed by the Encyclopædia, in which it is called an African island; and in “Paul et Virginie” it is described in the same manner. But without referring to authorities, common sense decides the question. It is only 400 miles from Madagascar, while it is four times that distance from the East Indies, and though now in possession of England, it does not form part of the East Indian dependencies, but has a Chief Justice appointed by the Crown of England.

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Cur. adv. vult.

LORD GIFFORD, Ch. J. now delivered the judgment of the Court, and having stated the facts of the case, said :

The rule *nisi*, which has been obtained for setting aside the verdict in this case, was granted on two grounds. First, that the vessel ought not to have been sold, but ought to have been repaired. Secondly, with respect to the insurance on freight, that no risk attached, because the cargo was not shipped in the East Indies or Indian islands, but at the Mauritius.

As to the objection that the ship ought to have been repaired, and not sold, it is unnecessary for me to investigate *the numerous cases on the subject: *Reid v. Darby*,§ the case of the

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† 23 R. R. 587 (3 Brod. & Bing. Moore, 115).

147).

§ 10 R. R. 246 (10 East, 143).

‡ 21 R. R. 538 (8 Taunt. 755; 3

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Gratitude,† *Idle v. The Royal Exch. Assur. Co.*,‡ *Read v. Bonham*,§ and others. This principle may be clearly laid down, that a sale can only be permitted in case of urgent necessity, that it must be *bonâ fide* for the benefit of all concerned, and must be strictly watched. Nothing now can impeach the correctness of this principle, and the only question here is, did the evidence establish that urgent necessity? The jury have come to the conclusion that it did; and after hearing the notes of the learned Judge who presided, I am of the same opinion. The vessel was seaworthy when she left the Mauritius; after that, and before she reached the Cape, she encountered a severe storm, and with the utmost difficulty succeeded in making Symond's Bay; there she underwent a first survey, with her cargo on board, and as the survey under those circumstances was necessarily incomplete, she received a second, when it was ascertained she could not be repaired at Symond's Bay. The captain applied to Lloyds' agent, and by his advice, and for the benefit of all concerned, sold the vessel. The purchaser, after a month had elapsed, succeeded in bringing her round to Table Bay, but to shew the state she was in, he did not attempt to repair, but broke her up at once. On these facts, I think a case of urgent necessity has been made out. It is not disputed that the sale was *bonâ fide*; and it is clear that it was for the benefit of all concerned. I agree that it is not sufficient to shew that the sale was *bonâ fide* and for the benefit of all concerned, unless it be also shewn that there was urgent necessity for its being resorted to, but that having been satisfactorily proved in the present instance, the verdict cannot be disturbed on that ground.

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With respect to the policy on freight, it was incumbent for the plaintiff to prove that the Mauritius was an island falling within the terms of the policy. Now there can be little doubt that, geographically considered, the Mauritius is not in India or among the Indian islands; and the testimony to this point on the part of the plaintiff rested on a single witness, who said he considered the island to be in India. This was met by testi-

† 3 Rob. A dm. Rep. 240.

§ 23 R. R. 587 (3 Brod. & Bing. 147;

‡ 21 R. R. 538 (8 Taunt. 755; 3 6 Moore, 397).

Moore, 115).

mony on the part of the defendant, that it was an island belonging to the Madagascar Archipelago, and in physical geography, part of the district of Africa. No evidence was adduced to shew that it was esteemed Indian in mercantile acceptation, and on this part of the case the Court thinks the plaintiff has failed. The verdict must be confined therefore to the policy on the ship.

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Verdict reduced accordingly.

N.B.—In a subsequent action against another underwriter on the second policy, tried at the London sittings after this Term, evidence being adduced to shew that in mercantile acceptation, the Mauritius is esteemed an Indian island, the jury found a verdict for the plaintiff.

DODINGTON v. HUDSON.

(1 Bing. 464; S. C. 8 Moore, 610; 2 L. J. C. P. 60.)

An attachment was issued against a defendant for not *commencing* within four days (at the end of which time the attachment was moved for) compliance with an order of Court, which it would have taken him three weeks to complete.

1824.
Feb. 10.

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VAUGHAN and Taddy, Serjts. shewed cause against a rule obtained by Pell, Serjt. for an attachment against the defendant, for disobedience of an order of Court, to reinstate the plaintiff's premises forthwith. The affidavit on which the rule had been obtained stated, that the defendant had taken no steps to comply with the order, although four days had elapsed since it had been served.

It appeared also, by affidavit, and it was urged on the part of the defendant against the issuing of the attachment, that it would take three weeks to reinstate the plaintiff's premises, and that the attachment ought not to be moved for till those three weeks had elapsed.

Sed per CURIAM :

The attachment is not required because the defendant has not completed, but because he has not even commenced, a compliance with the order of the Court. If you could shew that you

DODINGTON ^{v.} HUDSON. had made a beginning, the rule would not be made absolute. As no excuse is offered, the attachment must issue.

Rule absolute.

1824.
Feb. 12.

LEMCKE v. VAUGHAN.

(1 Bing. 473—483; S. C. 8 Moore, 646; 2 L. J. C. P. 44.)

[473]

A misdescription of the person to whom a licence from the Crown is granted to trade with the enemy, does not invalidate the licence.

THIS was an action of assumpsit on a policy of insurance made 30th August, 1810, at and from Heligoland to any port or ports in the Baltic and Gulph of Finland, against all risks, including the risk of craft, and until safely warehoused in the warehouse of the consignees, at the final ports or places of discharge, with liberty to carry and exchange real or simulated papers and clearances, and to seek, join, and exchange convoys or ship or ships, with leave to proceed and sail to, and touch and stay at, any ports or places whatsoever, and to touch, stay, discharge, and re-load cargoes at any port in Sweden; and to wait for orders, and for any purposes whatsoever, at or off any ports or places they might touch at, and to return to any port or ports without being deemed a deviation. At the foot of the policy was the following memorandum: "On goods as shall be declared and valued hereafter," and indorsed on the policy was a declaration particularizing the goods, and valuing them at 10,150*l.*, and the insurance was declared to be on such goods, per the *Vrouw Hendricka*, Captain Hendricks. The plaintiff declared as for a total loss. The defendant pleaded the general issue, *non assumpsit*.

This cause came on to be tried at the sittings at Guildhall, after Michaelmas Term, 1821, before Dallas, Ch. J. when a verdict was found for the plaintiff, damages 500*l.*, subject to the opinion of the Court on the following case:

[*474] The plaintiff was a merchant at Hanover, and a native of that country, and at the time of effecting the *policy, of granting the licence of the voyage, and of the loss, was residing within the Hanoverian dominions. The plaintiff, in 1810, was the owner of goods then lying at Heligoland, consisting of British colonial

produce, which had been imported thither from this country, and were then in the possession of his agents there.

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The island of Heligoland was captured by the British forces in 1809, and has since continued under the dominion of Great Britain.

The plaintiff having resolved to send these goods to some of the neutral ports in the Baltic, employed as his agent for that purpose Charles Frederick Hampe, and sent him to Heligoland in that character. Hampe was a merchant, and was then on the point of coming to reside in this country, and had given instructions to his correspondents to procure him a residence here. The plaintiff, in August, 1810, wrote to one Frederick Klingender, his agent in London, instructing him to effect an insurance to cover the adventure, and in consequence thereof, and prior to any vessel being chartered, Klingender effected the policy declared upon, which the defendant subscribed for 500*l*. Upon Hampe's arrival at Heligoland he wrote to Klingender, directing him to charter a vessel and send her to Heligoland, for the purpose of loading her with the plaintiff's goods; and he also directed Klingender to procure and send him a licence. Klingender accordingly, on the 27th of August, 1810, chartered the *Vrouw Hendricka*, a neutral vessel, and, by the terms of the charterparty, she was to proceed to the island of Heligoland, or so near thereunto as she might safely get, and then load a complete cargo of lawful and permitted merchandize, and being so loaded, therewith to proceed to a port in the Baltic, but not higher up than Koningsberg and deliver the same. Klingender also in pursuance of his instructions applied *for and obtained the following order in council, and licence :

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“ At the Council Chamber, Whitehall,
the 28th day of August, 1810.

“ Present,

“ The Lords of His Majesty's most Honourable
Privy Council.

“ (Duplicate.)

“ Whereas there was this day read at the board the humble petition of C. F. Hampe, of London, merchant, It is ordered in

LEMCKE
^{c.}
 VAUGHAN.

council that a licence be granted to the petitioner for permitting a vessel bearing any flag except the French, to proceed with a cargo of British manufactures, colonial produce, and such goods as are permitted to be exported from Heligoland, to any port in the Baltic not under blockade, notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined to any other neutral or hostile port, and to whomsoever such property may appear to belong, upon condition that the name and tonnage of the vessel, name of her master, and time of her clearance from Heligoland, shall be indorsed upon the said licence; and that a certificate from the proper officer of the customs at Heligoland shall accompany the cargo, certifying that the same was originally exported from the United Kingdom; such licence to remain in force for four months from the date hereof; and at the expiration of the same period, or sooner if the voyage be completed, to be deposited, as the case may be, with the commissioner of his Majesty's customs at the port of London, or with the collectors of the customs at the out-ports. And the Right Honourable Richard Ryder, one of his Majesty's principal Secretaries of State, is hereby specially authorized to grant such *licence, in case he shall see no objection thereto, annexing to such licence the duplicate of this order, herewith sent for that purpose.

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“CHETWYND.”

“To all Commanders of His Majesty's Ships of War, Privateers, and all others whom it may concern, greeting:

“I, the undersigned, one of his Majesty's principal Secretaries of State, in pursuance of the authority given to me by his Majesty, by order of council, under and by virtue of power given to his Majesty by an Act passed in the 48th year of his Majesty's reign,—intituled ‘An Act to permit goods secured in warehouses in the port of London, to be removed to the out-ports for exportation to any part of Europe, for empowering his Majesty to direct that licences which his Majesty is authorized to grant under his sign manual, may be granted by one of his Majesty's principal Secretaries of State, and for enabling his Majesty to

permit the exportation of goods in vessels of less burthen than are now allowed by law, during the present hostilities, and until one month after the signature of the preliminary articles of peace,'—and in pursuance of an order of council especially authorizing the grant of this licence, a duplicate of which order of council is hereunto annexed, do hereby grant this licence for the purposes set forth in the said order of council to C. F. Hampe of London, merchant, and do hereby permit a vessel bearing any flag except the French to proceed with a cargo of British manufactures, colonial produce, and such goods as are permitted by law to be exported from Heligoland to any port in the Baltic not under blockade, notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined *to any neutral or hostile port, and to whomsoever such property may appear to belong; provided that the name and tonnage of the vessel, name of her master, and time of her clearance from Heligoland shall be indorsed on this licence, and that a certificate from the proper officer of the customs at Heligoland shall accompany the cargo, certifying that the same was originally exported from the United Kingdom. This licence to remain in force for four months from the date hereof, and at the expiration of the said period, or sooner, if the voyage be completed, this licence shall be deposited, as the case may be, with the commissioners of his Majesty's customs at the port of London, or with the collector of the customs at the out-ports.

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“ Given at Whitehall, the 28th day of August,
1810, in the fiftieth year of his Majesty's reign.

“ R. RYDER.”

The indorsements required by the licence were duly made, and also certificate from the proper officer of the customs at Heligoland, as required by the licence. The C. F. Hampe named in the order of council and licence was the same person as the C. F. Hampe employed by the plaintiff as above stated.

The vessel then proceeded to Heligoland, and upon her arrival there the goods specified in the policy were shipped on

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board by Hampe, the goods being the property of the plaintiff, and of the value stated in the policy. On the 17th September, 1810, the vessel with her cargo sailed under convoy from Heligoland, Hampe being on board of her as supercargo, bound for Swinemunde in the Prussian dominions. On the 31st October, 1810, she arrived with her said cargo in the roads of Swinemunde, and soon after her arrival the vessel and her cargo were seized by a Prussian military force, and were subsequently condemned by the public authorities at *Swinemunde, and the cargo became wholly lost to the plaintiff.

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Before any of these circumstances had taken place Hanover was taken possession of in a hostile manner by the French troops, and during the whole period of the above-mentioned transactions the powers of government were exercised in Hanover by Jerome Buonaparte, the brother and ally of Napoleon Buonaparte, who was then at the head of the French Government and at war with this country, Jerome Buonaparte having assumed the title of King of Westphalia, and Hanover having, on the 10th July, 1810, been declared by Napoleon Buonaparte a department of such kingdom of Westphalia: but these acts were never recognized by the Government of this country, nor was any cession of Hanover made, nor any war declared between Hanover and this country.

The plaintiff upon the trial called as a witness a clerk from the council office, who produced several original petitions, orders in council, and licences thereupon granted about the time of the granting of the licence in question; in some of which petitions, orders in council and licences, the residence of the petitioners was not stated; in others even the names of the persons intended to be interested were wholly omitted; and the petitions were stated to have been presented "on behalf of different merchants," without specifying either their names or national character: and further, the plaintiff offered to prove by the same clerk, that at the time when the licence in question in this action was granted, the residence of the petitioner was not considered a material circumstance at the Privy Council board, which he was ready to verify upon his own personal knowledge of the course of business, and also by the production of the

council books, in which the applications for licences and the minutes of decisions thereon were entered.

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The defendant objected that neither the other petitions and licences nor the parol testimony as to the practice and understanding at the council board were admissible.

The plaintiff insisted that the proposed proof was admissible, and ultimately it was agreed that it should be made one of the points for the consideration of the Court upon the special case, whether the proposed evidence was competent or not.

The general question for the opinion of the Court was,

Whether the plaintiff was entitled to recover? If the Court were of that opinion the verdict was to stand; if not, the verdict was to be set aside and a nonsuit entered: either party to be at liberty to turn the case into a special verdict.

Taddy, Serjt. for the plaintiff:

The defendant relies on the case of *Klingender v. Bond*,† which is a decision on the same policy on which this action arises, and in which the Court held that the description of Hampe, as a merchant of London, when in fact he did not reside there, was a fatal objection to the plaintiff's claim. But that case was decided without much argument, upon a motion for a new trial: after that time the opinions of the Courts, with respect to these licences, entirely changed, and it became the practice to give the most liberal and extended construction to them, when it was found that the trade of the country could not be carried on without them: *Flindt v. Scott*,‡ *Morgan v. Oswald*,§ case of the *Good Hope*,|| case of the *Vrow Cornelia*.¶ The plaintiff being a Hanoverian was not an alien enemy, nor even an alien (*Calvin's case* ††), so that *the object of this licence was not to remove any disability of the person, but a disability affecting the ship; and most of the preceding decisions on the subject of licences have turned on disabilities existing in the person of the grantee. To what an extent the decisions have

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† 13 R. B. 292 (14 East, 484).

|| Edw. Adm. 7.

‡ 15 R. B. 615 (5 Taunt. 674, 15 East, 525).

¶ Edw. Adm. 24.

†† 7 Co. Rep. 9 b.

§ 3 Taunt. 554.

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been carried in overlooking even disabilities of the person, appears from *Robinson v. Touray*,† *Bazett v. Meyer*,‡ *Hagedorn v. Reid*,§ *Usparicha v. Noble*.|| But the licence in the present case has no object beyond the ship, and no limitation in respect of ship, except as to the French flag. There can be only two grounds for contending that this licence was intended for a London merchant; one, that the property to be conveyed was the property of a London merchant; the other, that the ship belonged to the port of London, but both these suppositions are negatived by the language of the licence itself. Even if it were otherwise, the supposed misdescription amounts to nothing; the grantee is described as of a place at which he was about to reside, and even in a deed this would be sufficient. The evidence which has been excluded was not necessary to the support of the plaintiff's case, and may therefore be at once abandoned.

Vaughan, Serjt. for the defendant, relied on the case of *Klingender v. Bond*; he contended that a true description of the person of the grantee was necessary to make the Government acquainted with the nature of the enterprize, and to ascertain that it was not a cover for hostile purposes, and he cited *Warin v. Scott*,¶ and *Busk v. Bell*†† to shew that there ought to be in every licence a true description of the person of the grantee.

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Taddy, Serjt. in reply, observed, that *Warin v. Scott* was the case of an alien enemy, residing in Great Britain, who had a very special licence to enable him to travel from one part of the kingdom to another, so that an accurate personal description was absolutely necessary, and he cited the case of *Cousine Mary Anne* ‡‡ to shew that in the Admiralty Courts a plea of alien enemy was not allowed where the licence was for property, to whomsoever it might appear to belong.

Cur. adv. vult.

† 13 R. R. 781 (3 Camp. 158;
1 M. & S. 217).

‡ 5 Taunt. 824.

§ 1 M. & S. 567.

|| 12 R. R. 360 (13 East, 332).

¶ 13 R. R. 698 (4 Taunt. 605).

†† 14 R. R. 270 (16 East, 3).

‡‡ Edw. Adm. 21.

LORD GIFFORD, Ch. J. now delivered the judgment of the COURT, and after stating the case, proceeded as follows :

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The question with regard to the admissibility of the testimony of the clerk from the Privy Council office having been abandoned, the only question is, whether the licence, having been granted to Hampe by the description "of London, merchant," and the case having found, that at the time of the licence being granted he intended to come to reside in London, though he had not then actually come, this misdescription, if any, vitiates the licence. The same question came before the Court of King's Bench in the year 1811 in the case of *Klingender v. Bond*, in which the plaintiff was nonsuited, on the ground of this misdescription; and upon a motion to set aside this nonsuit, on which occasion the point did not undergo any great degree of discussion, Lord ELLENBOROUGH retained the same opinion as he had pronounced upon the trial of the cause. It is true, that at an early period of the issuing these licences, Lord ELLENBOROUGH and the Courts were disposed to construe them strictly, as being in the nature of grants from the Crown, but that opinion did not ultimately prevail; it was soon considered that the object of the licences was to facilitate *the commerce of the country, and that they ought therefore to receive a liberal construction; and various cases were decided which strongly confirm this view of the subject. In *Morgan v. Oswald* it was holden that a licence to a British merchant for a ship to go to a hostile port, and bring home a cargo of goods, authorised the importation of such goods, being the property of an alien enemy, subject of that hostile country, and therefore authorised him to insure, and enforce his contract of insurance in our Courts. In *Warin v. Scott*, indeed, it was holden that a licence, authorising the exportation of goods by Van Buuren and Kanningeisser, or other British merchants, would not protect the exportation of those goods by Van Eyche, an alien enemy, whose licence to reside in this country had expired; but in *Hagedorn v. Reid* it was decided that a licence to J. P. Hagedorn, of London, merchant, on behalf of himself or other British or neutral merchants, would protect a ship in which Hagedorn and an alien enemy were jointly interested; and this was decided on the same principle as *Morgan v. Oswald*, namely,

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that the licence was intended to legalize a commerce beneficial to the country, without regard to the individuals engaged in that commerce. In Edward's Admiralty Cases, there are several other cases to the same effect. Now, first, was there any fraud intended or committed in the present instance? The grantee, it is true, is described as of London, merchant, at a time when he had not yet arrived in London, though he actually purposed to reside there; but the object of the licence was simply to legalize the adventure, under the provisions of an Order in Council, and the conditions imposed in the licence are applicable, not to the person, but to the ship; those conditions are, that the name and tonnage of the vessel, the name of her master, and time of her clearance from Heligoland, shall be indorsed upon the licence, and that *a certificate from the officer of the customs at Heligoland shall accompany the cargo. All those conditions have been complied with; and as to the description of the merchant, it is not found that he intended to remain at Heligoland, but on the contrary, that he had a fixed intention of coming here. Now as these instruments are to receive a liberal construction, as the object of them is to legalize the adventure rather than to qualify the party applying, it appears to us, with all deference to the decision in *Klingender v. Bond*, upon considering the subsequent cases, in which these licences have been viewed with less rigor, that the misdescription in the present instance does not vitiate the licence, and that the plaintiff is entitled to recover.

Judgment for plaintiff accordingly.

VAUGHAN *v.* LEMCKE.

IN ERROR.

(7 Dowl. & Ry. 236—244.)

K. B.
MICH. TERM.
1825.
Nov. 22.[7 Dowl. &
Ry. 236]

[THE judgment of the Common Pleas having been brought up on error to the King's Bench, the special case having been turned into a special verdict.]

F. Pollock, for the plaintiff in error :

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The judgment of the Court below is erroneous, and must be reversed. The licence did not protect the adventure. It was granted to an individual described upon the face of it as a merchant of London, but who in fact was not so ; consequently there was a concealment, or misrepresentation of facts, and a fraud upon Government, which rendered the licence void. It was decided in *Klingender v. Bond*,† which was an action upon the very same policy out of which the present case springs, that the description of Hampe as a merchant of London, when in fact he resided elsewhere, was a fraud upon Government, which avoided the licence, and barred the plaintiff's claim upon the policy. Hampe was a native and a resident of Hanover, and looking at the then state of that country, it is clear that the British Government did not intend to grant such a licence to such an individual, for he was then actually in the situation of an alien enemy.

(BAYLEY, J. : I think not ; the inhabitants of Hanover cannot be considered as being then alien enemies, because Hanover was not ceded to France, nor did Great Britain ever declare war against Hanover.)

At any rate the person obtaining the licence was misdescribed upon the face of it ; and that is a fraud which invalidates the licence.

(BAYLEY, J. : How can we say that the misdescription of

† 13 R. R. 292 (14 East, 484).

VAUGHAN Hampe, even if it amounts to that, was done fraudulently?
 v.
 LEMCKE. The jury have not found fraud as a fact.)

Nor need they. In *Mennett v. Bonham*, † the Court held the licence void for fraud, and yet there the jury had not found fraud as a fact.

(BAYLEY, J.: That, and the other cases of the same class, have all been overruled by the subsequent decision of the Court of Exchequer Chamber in *Flindt v. Scott*. ‡)

[*242] It is submitted not, so far as regards this particular point. Some of the observations made by the Court in *Mennett v. Bonham* are particularly applicable to this case. Lord ELLENBOROUGH said, "Many public inconveniences might arise from permitting an *indiscriminate intercourse to alien enemies between our own ports and those of the enemy, which might with less hazard be permitted to our own subjects; many collateral negotiations might be instituted injurious to the State in one case, which could not be expected in the other. All, however, which I demand for the security of the State, is, that it should appear, by the terms of the licence, that where it is used to cover a trade by the subject of an enemy, from this country to a hostile port, such an use of it should have been within the contemplation of the Government issuing it; that the Government should not be hood-winked as to the real object of the parties obtaining it:" and BAYLEY, J. said, "Two questions have been made; one upon the construction of the licence; in deciding which, we ought to consider what was the intention of the Crown at the time it was granted, as it may be collected from the licence itself; for it should appear that the King was put in possession at the time of all the circumstances and objects to which it was to be applied." Now here, Government was hood-winked, and the King was not put in possession of all the circumstances; for Hampe was represented as a merchant of London, being at the time resident in Hanover, which place was under the dominion of the enemy. Hampe, therefore, was in the situation of an alien enemy, for so soon as the French took

† 15 East, 477.

‡ 15 R. R. 615 (5 Taunt. 674).

possession of Hanover, the inhabitants of that country ceased to be subjects of Great Britain and became subjects of France; their property became liable to seizure by the British Government, and they themselves became the enemies of the British Government; and to a person so situated, it is impossible to suppose that the Crown could have intended to grant this licence.

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D. F. Jones, contra, was stopped by the COURT.

ABBOTT, Ch. J. :

I am clearly of opinion that the judgment of the Court of Common Pleas was right, and ought to be affirmed. The modern cases upon this subject have *established a different and more enlarged and liberal rule of construction than was acted upon in earlier decisions, and I think the change is right. The rule now is, that in construing instruments of this nature, we are to look to their substance, not their form. It was decided in *Flinndt v. Scott*, by the Court of Exchequer Chamber, that licences to trade with an enemy are to be construed liberally, and that though an agent, in obtaining a licence, did not represent to the Privy Council that he applied on behalf of a hostile trader, the concealment did not vacate the licence, or vitiate the policy; and if it is immaterial to the validity of the licence who the person is to whom the goods belong, and how he is described, it would be very difficult to say that the mode of describing the person who actually applies for the licence can be material either. Some very special cases might perhaps be imagined, in which a misdescription in that respect might be a fraud upon the Crown, and might defeat the licence; but this is not one of those cases: and generally speaking, it must be perfectly immaterial who the party is that applies for the licence, or how he is described. Hanover was at the time of this transaction a part of the British dominions. The great object of granting these licences was to promote the trade of Great Britain and her dependencies; and it would tend entirely to destroy that object, if we were to hold that the licence and the policy in this case were void.

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VAUGHAN ^{c.} BAYLEY, J.:

LEMCKE.

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I am of the same opinion. When *Mennett v. Bonham*, and some of the other cases upon this subject were decided, the principles upon which these licences have been granted, and by which they ought to be construed, were not thoroughly understood; but they have since been put upon the right footing, and I think the late decisions are those by which we ought to be guided. The earlier cases, where the licences were held to be void, were decided upon the ground of some concealment or *fraud, as in the *Jonge Johannes*; † but there was no fraud or concealment in this case, and if there was, the jury ought to have found it as a fact, for, upon a special verdict, particularly, we are precluded from presuming fraud, where none is found by the jury. The general language of the licence shews that it is perfectly immaterial to the meaning and intent of Government in granting it, who or what the person for whom the licence is obtained, or to whom the goods belong, may be; the object of Government is the promotion of trade, and it would be most prejudicial to that object to say, that the plaintiff below could not recover upon this policy.

HOLROYD, J., and LITLEDALE, J., briefly expressed themselves of the same opinion.

Judgment affirmed.

† 4 Rob. Adm. Rep. 263.

HASKER, CLERK, v. THE RIGHT HONOURABLE CHARLES MANNERS SUTTON AND OTHERS.†

(1 Bing. 500—509 ; S. C. 9 Moore, 2; 2 L. J. C. P. 68.)

1824.
Feb. 5, 6.

[500]

Devise to A. when he should attain twenty-one, for life; and after his decease to the first son of the body of A. lawfully begotten, and the heirs male of the body of such first son; like remainders to the second and other sons in succession; like remainder to the daughter or daughters. Like devise to B., brother of A., with like remainders to B.'s issue. Like devises to C. and D., other brothers of A., with like remainders to their respective issues. And in case either or any of them, (A., B., C., and D.,) should die before the age of twenty-one years, or without leaving any child or children of his or their bodies lawfully begotten, then that the several estates devised to him or them should go to the survivor or survivors, share and share alike, under the same limitations as before described.

A. having attained twenty-one, and being a bachelor and unmarried, made a feoffment and levied a fine with proclamations of the property devised to him, to his own use in fee, and to the intent to destroy contingent uses and estates limited to his sons and daughters:

Held, that by so doing he acquired an absolute estate of inheritance in the property.

JOHN HASKER, by his last will, dated 28th October, 1780, gave and devised, among other hereditaments, the hereditaments comprised in the agreement hereinafter mentioned unto William Hasker, the plaintiff, second son of his nephew, Thomas Hasker, when and so soon as he attained his age of twenty-one years, for and during the term of his life, subject as in the will was mentioned, and immediately from and after his decease he gave and devised the same hereditaments to the first son of the body of the plaintiff, William Hasker, lawfully begotten, and to the heirs male of the body of such first son, lawfully issuing; and in default of such issue to the use and behoof of the second, third, and every other son of the body of the plaintiff William Hasker, lawfully begotten, and to the heirs male of their respective bodies, lawfully issuing, severally and respectively, and in remainder the one after the other in seniority of age; the elder of such sons, and the heirs male of his body, being always preferred to the younger sons and the heirs male of their bodies; and in default of such issue, to the use and behoof of

† See, however, *Cooke v. Mirehouse*, 34 Beav. 27.—B. C.

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the daughter or daughters of the plaintiff *William Hasker, lawfully begotten, and the heirs male of her or their respective body or bodies; and the testator also gave, devised, and bequeathed the two leasehold messuages therein mentioned unto the plaintiff William Hasker, his executors, administrators, and assigns, when he should attain to his age of twenty-one years; and the testator gave and devised certain other hereditaments, in his will described, to John Hasker, eldest son of his nephew, Thomas Hasker, when he should attain his age of twenty-one years, for his natural life, subject as therein mentioned; and from and after his decease the testator gave and devised the same to the first and other sons of John Hasker, in tail male, and for default of such issue, to the daughter or daughters of John Hasker, in tail male, as tenants in common, in the same manner as he gave the first-mentioned hereditaments to the sons and daughters of the plaintiff, William Hasker, after his decease. And the testator gave and bequeathed, subject as before, certain other messuages and premises to Thomas Hasker, the third son of his nephew, Thomas Hasker, when he should attain his age of twenty-one years, for life, remainders to his sons and daughters, as to the sons and daughters of William Hasker; and he also gave and devised, subject as before, certain leasehold hereditaments to Thomas Hasker, the third son of his nephew, T. H. his executors, administrators, and assigns, when he should attain the age of twenty-one years. And the testator also gave, subject as before, certain other hereditaments unto Richard Hasker, fourth son of his nephew, Thomas Hasker, when he should attain twenty-one, for life, with remainders to his sons and daughters as in the former cases. And he also gave and bequeathed all his right, title, estate, and interest of, in, and to, a certain mill, with its appurtenances, called Longbridge Mill, situate at Sherfield on the Loddon, then in the occupation *of George Woodroffe, to Richard Hasker, his executors, administrators, and assigns, when he should attain his age of twenty-one years, for the residue of a certain term of years which he had therein then to come. And it was the testator's express will, desire, and direction, that no timber should be cut from any of the estates devised, until the devisee claiming the same should

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attain the age of twenty-one years, except for necessary repairs. And in case either or any of the sons of his nephew, Thomas Hasker, should happen to die before he or they should attain the age of twenty-one years, *or* without leaving any child or children of his or their body or bodies, lawfully begotten, then it was the testator's express will and desire, that the several estates devised to him or them should go to the surviving son or sons of his nephew Thomas Hasker, share and share alike, when and so soon as he or they should attain to his or their respective age or ages of twenty-one years, for his or their natural life or lives, and immediately from and after his or their decease or deceases, to such uses, limitations, and appointments as were thereinbefore limited and appointed of the several estates given and devised to him or them respectively; and the testator, by his will, authorised and empowered his executors, and the survivors and survivor of them, to receive the rents, issues, and profits of each particular estate devised to the sons of his nephew, Thomas Hasker, until the devisee entitled to the same should attain his age of twenty-one years, for the purpose of paying and discharging out of the rents, issues, and profits of each particular estate the annuities charged on such estate, and the interest of money then raised, or to be raised, on the security thereof, with other incidental expences that might happen to affect or incumber the same during the minority of the devisee entitled thereto, the residue of such rents, issues, and profits, if any, to remain *from time to time in the hands of his executor for the sole benefit of, and to be paid to, such devisee when he should come of age.

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The testator left his niece Dorothy, the wife of John Lee, his heiress-at-law, and on the death of the testator, the reversion in fee of the hereditaments devised by the testator's will to John, William, Thomas, and Richard Hasker, for their respective lives, with remainder to their respective sons and daughters, as before mentioned, descended to her as heiress-at-law.

Dorothy Lee died in 1797, leaving Henry Pincke Lee, her eldest son and heir-at-law, to whom the reversion descended, he being also the heir-at-law of the testator.

Previous to January, 1817, the plaintiff, William Hasker, attained his age of twenty-one years, and was a bachelor, and

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had no issue at the date of the feoffment hereinafter mentioned, and the livery made pursuant thereto.

By indenture, bearing date the 1st January, 1817, and made between the plaintiff, William Hasker, of the one part, and William Seymour, of the other, William Hasker demised all the hereditaments and premises which were originally devised to him by the testator, comprising (amongst others) the hereditaments and premises mentioned in the agreement, to hold the same (subject to the encumbrances affecting them) unto William Seymour, his executors, administrators, and assigns, for the term of ninety-nine years, if the plaintiff, William Hasker, should so long live, upon trust for the plaintiff, William Hasker, and his assigns.

By an indenture of feoffment, dated the 3rd January, 1817, and made between the plaintiff, of the first part, Henry Pincke Lee, of the second part, John Cole, of the third part, and Jonathan Hilkieah Bricknell, of the fourth part, and by livery of seisin made according to that indenture, after reciting to the effect above stated, and *that the plaintiff, William Hasker, being desirous of acquiring the fee simple of the hereditaments devised by the will of the testator to him, had applied to Henry Pincke Lee, as the heir-at-law of the testator, to concur with him in a feoffment and fine of the hereditaments unto Richard Cole and his heirs, to and for the use of the plaintiff, William Hasker, to the intent to destroy the contingent uses and estates limited to his sons and daughters, of and in the hereditaments devised to him, and all other contingent uses and estates whatsoever thereon respectively expectant or subsequent thereto, and to pass the reversion in fee therein, then vested in Henry Pincke Lee as heir-at-law of the testator to the use aforesaid: It was witnessed, and the plaintiff did grant and enfeof, and Henry Pincke Lee did grant, enfeof, and confirm unto Richard Cole, his heirs and assigns, the hereditaments comprised in the agreement, to hold unto him, his heirs and assigns for ever, to such uses as the plaintiff should by any deed or writing direct and appoint; and in default of such direction and appointment, to the use of the plaintiff, William Hasker, and his assigns for life, with remainder to the use of Richard Cole, his heirs and assigns, during the life

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of the plaintiff and his assigns, upon trust, for the sole benefit of the plaintiff and his assigns, and to the intent that any wife of the plaintiff might not be entitled to dower, with remainder to the only proper use of the plaintiff, his heirs and assigns for ever. The indenture contained a covenant by the plaintiff and Henry Pincke Lee, to levy unto Richard Cole and his heirs a fine *sur conuzance de droit come ceo &c.* with proclamations, of the hereditaments, and a declaration that the fine should enure to the several uses, and upon the trust, intent, and purpose in the indenture expressed and contained concerning the same.

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A fine *sur conuzance de droit come ceo &c.* with proclamations, was duly levied in pursuance of this covenant.

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The plaintiff having been advised, that by the above-mentioned means he acquired an estate in fee simple in the hereditaments devised by the will of the testator, contracted with the defendants for the sale to them of such hereditaments, but they afterwards objected to the title thereto, and the plaintiff exhibited his bill in the Court of Chancery against them, for the purpose of compelling them to complete their purchase. The defendants having put in their answer, the cause came on to be heard before his Honor the Vice-Chancellor on the 6th May, 1822, when his Honor directed a case to be made for the opinion of this Court upon the following question,

Whether the plaintiff, under and by virtue of the will of John Hasker, and by the indenture of demise of the 1st January, 1817, and the indenture of feoffment of the 3rd January, 1817, and the fine levied in pursuance of the covenant contained in the indenture of the 3rd January, 1817, acquired an absolute estate of inheritance in fee simple, of and in the said hereditaments, discharged from the remainders and executory devises, if any, limited and created by the will of John Hasker?

Pell, Serjt. for the plaintiff:

If the limitations expectant upon the determination of William Hasker's estate were remainders and contingent, they were barred by the fine and feoffment of 1817, and the plaintiff's title is good. They were remainders according to the general rule, which lays it down, that a limitation shall never be construed as an executory

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devise, where there is a preceding estate of freehold sufficient to support a remainder, and the estate limited to William Hasker for life was clearly of that nature; whether or not they *were contingent, will depend upon the construction to be put on the word "or" in the sentence, "*In case either of the sons of Thomas Hasker should happen to die before he or they should attain the age of twenty-one years, or without leaving any child.*" Now, in a will or surrender, the Courts have always construed the "or" in such a sentence conjunctively or disjunctively, or have expunged it altogether, as would best effectuate the intention of the devisor or surrenderer. *Price v. Hunt*,† *Soullé v. Gerrard*,‡ *Barker v. Suretees*,§ *Wright v. Kemp*,|| *Fairfield v. Morgan*,¶ *Eastman v. Baker*,†† *Crumph v. Norwood*,‡‡ *Collinson v. Wright*,§§ 1 Eq. Cas. Abr. 188. But the intention of the devisor in the present case was most clearly that the "or" should be read conjunctively "and," or be omitted. For, if William Hasker had married and died before twenty-one leaving issue, it never could have been the devisor's intention to leave that issue unprovided for; and yet such might have been the case if the "or" be read disjunctively. To justify the construction which will be contended for on the part of the defendant, if it is to be argued that the remainders over were vested, the Court must strike out the words, "he should attain the age of twenty-one years," an alteration much more extensive than that which is required by the plaintiff. William Hasker himself took a vested interest, though he was not to come into possession till twenty-one; *Boraston's case*;||| but if "or" be read as "and," it is impossible to contend that the remainders expectant on the determination of his life were vested, for they fall in every respect within the strict definition of a contingent remainder as given by Fearne. *Brownsword v. Edwards*,¶¶ *and *Doe dem. Usher v. Jessep*,††† will be relied on by the other side; but *Brownsword v. Edwards* is outweighed by the mass of conflicting

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† Pollexf. 645.

‡ Cro. Eliz. 525.

§ 2 Str. 1175.

|| 1 R. R. 748 (3 T. R. 470).

¶ 9 R. R. 609 (2 Bos. & P. (N. R.)

38).

†† 9 R. R. 728 (1 Taunt. 174).

‡‡ 7 Taunt. 363.

§§ 1 Sid. 148.

||| 3 Rep. 19.

¶¶ 2 Ves. sen. 243.

††† 11 R. R. 380 (12 East, 288).

authority; and in *Doe dem. Usher v. Jessep*, it was necessary to construe “or” in its natural sense, to give effect to the obvious intention of the testator.

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Bosanquet, Serjt. contra:

There is no reason for rejecting the “or,” or for reading it conjunctively. There would be nothing unreasonable in the supposition that the deviser wished to deter William Hasker from an early and imprudent marriage. But the ground upon which the defendants rely is, that the limitation in question was a vested remainder, to take effect after the natural expiration of the preceding estate for life to William Hasker, and the estates tail to his children. The testator having four great nephews gives a part of his estate to each for life, with remainder in strict settlement to his children. It is manifest that the surviving great nephews were not to take any thing as long as there was issue of the great nephew deceased; nor was the heir-at-law to take any thing as long as there was issue of any of the great nephews. The Court, therefore, will not put such a construction upon the terms of the limitation in question, as to defeat any of the preceding estates expressly limited, but will construe them as descriptive of the events in which those estates would fail, and as conveying a remainder after their natural expiration. The circumstance of the deviser having repeatedly used the words “when he shall attain the age of twenty-one years,” as descriptive of the time when the devisee would be entitled to possession, may easily account for the use of similar words in the limitation over, as describing an event in which the *limitation to the first taker for life would be likely to fail, though the subsequent words alone would have been sufficient for the purpose. In all the cases upon wills, in which “or” has been construed conjunctively, the first taker has been a devisee in fee, so that the limitations over were necessarily executory devises, displacing the first estate; and unless the construction adopted had prevailed, the heirs of the first taker in fee would have been ousted.

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(Lord GIFFORD, Ch. J.: If the Court construes this “or” disjunctively, they must strike out the whole condition as to the devisee’s dying under twenty-one.)

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The expressions of the devisor may be inaccurate, but the intention is plain; and if this case had occurred before *Price v. Hunt*, there could have been no doubt. The case of *Brownsword v. Edwards* is expressly in point, where Lord HARDWICKE not only considered a limitation, such as the present, as a vested remainder, but altered “and” into “or.” The defendants only seek to retain it. *Wright v. Kemp*, the only case in which “or” has been construed conjunctively, when the preceding limitation was not in fee, was the case of a copyhold, to the use of the surrenderor for life, remainder to W. W., an illegitimate son, for life, remainder in tail to the issue of W. W., lawfully begotten; and if W. W. should die in the lifetime of the surrenderor, or without issue, remainder to the surrenderor in fee: W. W. died, leaving issue, in the lifetime of the surrenderor, so that if the “or” had not been construed conjunctively the surrender would have been absolutely without effect. The words “without child or children” plainly refer to the former limitation in strict settlement, and have been considered in many cases to mean issue generally; and the “and leaving” has been considered as leaving at any time, so as to denote an indefinite failure of issue. *Roe v. Scott and Smart*.†

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The following Certificate was afterwards delivered :

“This case has been argued before us. We have considered the same, and are of opinion that the plaintiff, under and by virtue of the said will of the said John Hasker, the said indenture of demise of the 1st January, 1817, and the said indenture of feoffment of the 3rd January, 1817, and the said fine levied in pursuance of the covenant contained in the said last mentioned indenture, acquired an absolute estate of inheritance in fee simple of and in the hereditaments, discharged from the remainders limited and created by the will of the said testator, John Hasker.

“It was not contended before us that the said will contained any executory devise or devises affecting the said hereditaments.”

“ GIFFORD.

“ J. A. PARK.

“ J. BURROUGH.”

† Fearn, 473, n.

EXCH. TRINITY TERM.

LUDLOW v. GRAYALL.

(11 Price, 58—68.)

A remainder-man sells property, representing himself to have the concurrence of the tenant for life. The purchaser having been let into possession, pays off a charge to which the owners of the property are liable *ratione tenuræ*. He was held to have a lien on the property so far that he could not be turned out by the tenant for life pending a suit for specific performance of the agreement, to which the tenant for life is made a defendant.

MARTIN and *Wilbraham* shewed cause, upon the merits, against the common order *nisi* for dissolving the injunction which had been obtained in this case, restraining the defendant from further proceeding in the action of ejectment which had been brought by him against the plaintiff, or bringing any other action against the plaintiff, for the recovery of possession of the premises in the bill mentioned.

The substance of the plaintiff's equity, as stated in the bill, was this :—

Thomas Baker by his will devised the premises, upon trust, to permit his wife to take the profits during her life, and after her decease to permit his sister, Ann Grayall, the wife of the defendant, to take the rents, issues and profits during her life; and after her decease he devised the premises equally between his three cousins, James Baker, William Baker, and Henry Baker, and their respective heirs as tenants in common. Ann Baker, who afterwards married Daniel Baker, entered into the possession and receipt of the rents and profits. The bill then stated that in 1815, the wall and bank which formed the boundary of the lands devised, adjoining to and on the side of the river Severn, *had, from long neglect, been blown up, broken down, and washed away; and that at a Court of Sewers a presentment was made by the jury to that effect; and they also found that Daniel Baker, by reason of his tenure ought, at his costs and charges, to repair the wall and bank. By various presentments

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it had been found that the costs and charges of the necessary repairs amounted to 2,549*l.*, and under them the property was assessed at that sum; which exceeded the value of the estates for life of Ann Baker. Baker and Grayall therefore declined to pay such sums, and it was thereupon agreed between Baker and Grayall, and their wives, and the Bakers (the remainder-men), that the possession of the premises should be delivered to them (the Bakers), upon their indemnifying the other parties against all fines, costs, charges and expenses incident upon the presentments. An agreement was afterwards signed by Thomas Stokes, the then solicitor acting for Grayall and his wife, for the purpose of expressing their concurrence in that arrangement; and it was thereby agreed that Baker should give up the estate comprising, &c., being indemnified, &c. It was then stated by the bill, that on the 15th of March, 1817, the Bakers, for the purpose of discharging some part of the expenses which had been incurred in the building or repairing the wall and bank, agreed with James Cawthorn, the mason, to whom the sum of 1,300*l.* had become due on account of a part of the building and repairs done by him, for the sale of the messuage and lands thereafter mentioned (a part of the devised property) to him for the sum of *1,200*l.*, part of said sum of 1,300*l.* That agreement was reduced into writing, and signed by the Bakers, Cawthorn, and Grayall and his wife. Afterwards further expenses to a very large amount having been incurred, it was stated to have become necessary that the remainder of the premises should be sold, and that the Bakers having authority for the sale, contracted by an agreement, dated 6th September, 1817, for themselves and Grayall and his wife, who were said to have abandoned their interest in the premises as subject to the said charges so exceeding the value, &c. as well for the sale to the plaintiff of such of the premises as were not included in the agreement with Cawthorn, as for the sale of their right, title, and interest in reversion, expectant upon the deaths of Ann Baker, and Ann Grayall, in certain other hereditaments devised by the said will, in consideration of 4,000*l.* to be paid by the plaintiff to the Bakers, and of the sums of 1,690*l.* and 850*l.* to be also paid by him in discharge of certain mortgages. Such agreement between the

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plaintiff and the Bakers was reduced into writing and signed by them respectively; and Grayall and his wife were also named therein as parties thereto: and it was thereby in consideration of the sum of 5s. paid to Grayall and his wife, and of 1,000*l.* paid by plaintiff to the Bakers, on the part of Grayall and his wife, and the Bakers, agreed to sell to the plaintiff, his appointees, heirs and assigns, and at their expense to make out a good title to the premises, in all which, with the premises contracted to be sold to Cawthorn, Ann Baker and Ann Grayall were therein mentioned to *have agreed, for certain valuable considerations, to relinquish their several estates for life to the Bakers, and, for the considerations aforesaid, the Bakers agreed to sell to plaintiff all their right, &c. in reversion therein on the death of the survivor of Ann Baker and Ann Grayall. It was then stated, that the plaintiff having paid 160*l.* in part of the said purchase-money of 1,060*l.* agreed to pay the remaining 900*l.* upon having a conveyance made to him on the 21st of December then next; that in pursuance of the several agreements the plaintiff caused the draft of an indenture of release to be prepared, whereby in consideration of the sums of 160*l.* and 900*l.* therein mentioned to be paid by plaintiff to Cawthorn, and of a release therein contained of Grayall and his wife, and the Bakers, for the debt of 1,200*l.* mentioned in the agreement of the 15th of March, 1817, by Cawthorn; and of 4,000*l.* mentioned to be paid by the plaintiff to the Bakers, and by their direction, and of the sums of 1,690*l.* and 850*l.* to be further paid according to the covenants on the part of plaintiff, and of the sea wall having been repaired, and the presentments taken off at the cost of Bakers, they, Baker and his wife, Grayall and his wife, and the Bakers, and Cawthorn, with other necessary parties were expressed to release and convey the premises devised by the will of Thomas Baker, and comprised in the several agreements to William Perry, his heirs, and assigns, to the use of plaintiff, his appointees, heirs, and assigns. In the draft of the release was inserted a covenant from Daniel Baker for himself and Ann his wife, and by Grayall and his wife, to levy fines for the *further assurance of the premises. That draft was submitted to the solicitors of the respective parties, and amongst others, to George Strickland, who had

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succeeded Stokes, and then acted as the solicitor for Grayall and his wife, and was also the solicitor for Daniel Baker and his wife; and he perused and approved of it, and wrote thereon and signed his approval. Strickland afterwards wrote a letter on the subject of the conveyance from the parties for whom he was concerned, in August, 1818, wherein he stated that if Grayall and his wife were liable to any expenses of repairs of the wall, under the contract with Cawthorn, they would expect that liability to be removed by the Bakers. The conveyance was afterwards executed by Daniel Baker, the Bakers, Cawthorn, and all the other parties thereto, except Ann Baker, and Grayall and his wife. The plaintiff paid the sums of money to be paid by him upon the execution, a large proportion of which was applied to the payment of the expenses of building and repairing the sea wall and bank. The plaintiff was thereupon let into the possession and receipt of the rents and profits, and had ever since continued in such possession; Ann Baker died in July, 1817. Under these circumstances the bill charged, that although the said conveyance was not executed, nor any fine *sur concesserunt* levied pursuant to the covenant therein contained, by Ann Baker or Grayall and his wife, yet under the said agreements, and by the payment of the expenses of the building and repairing the wall and bank, the Bakers and Cawthorn had become entitled to the beneficial interest of Ann Baker, and Ann Grayall, or William Grayall *in her right, in the premises conveyed to, or for the use of the plaintiff; and that the plaintiff, after such conveyance, became entitled in like manner thereto, and had thitherto holden the possession of the premises accordingly.

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It was thereupon prayed that the defendant might set forth a list or schedule of all such letters, accounts, statements, bills of costs, receipts, papers, and writings being in his possession, or that of Strickland, his solicitor, and might produce &c. for the usual purposes: that it might be declared that the Bakers became entitled to the possession of the premises, as well against Daniel Baker and Ann his wife, as against the defendant, in consideration &c.:—that the plaintiff as claiming and being entitled to the said hereditaments, through them might be

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declared to be in like manner entitled to the possession thereof, as against the defendant; and that the defendant might be restrained from proceeding in the action of ejectment, and from commencing any other action, or taking any other proceedings at law for recovering the possession, or for disturbing the plaintiff in the possession:—that the agreements of the 13th of July, 1816, and the 11th of March, 1817, and the 6th day of September, 1817, might be decreed to be specifically performed and carried into execution by the defendant:—that the defendant might be decreed to execute, and to procure the said Ann Grayall to execute the conveyance, the draft of which had been approved, as mentioned in the bill; and to levy a fine &c., according to the *covenant therein contained, on their part, or that it may be referred to the said Master to settle and approve of a proper conveyance from the said defendants to plaintiff.

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The defendant in his answer denied that he and his were unwilling, or declined to pay their proportion of the several sums assessed, but admitted that they were unwilling to pay the whole amount of the assessments, being liable only to keep down, during the life of Ann Grayall, the interest of such principal sum of money as might have been properly expended in effecting the repairs of the sea wall. He denied that it was ever agreed that the possession of the premises should be delivered to the Bakers upon their indemnifying the tenants for life against all expenses incident upon the presentments, or that the written agreement in the bill mentioned, between the Bakers (if in fact any such agreement existed), was signed by Stokes under any authority from the defendant and his wife, or by their concurrence or consent; or that Stokes had any power or authority from them to sign any such agreement, or that he was at the time their solicitor, save only that he was employed by them and by the Bakers jointly, to exhibit a bill against Daniel Baker and others: and alleged that he was not generally employed by them as their attorney, and had neither any general or special authority to sign on their behalf any agreement. It was also submitted, that the agreement mentioned in the bill was not a valid, legal, or binding contract as against the

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defendants, as Ann Grayall was at the time a married woman, *and that, not being such a contract as is required by the Statute of Frauds, it could not be enforced in equity. The defendant denied that it became necessary for defraying the assessments, that the remainder of the premises devised should be sold; or that the Bakers, or any of them had authority either under the alleged agreement of the 30th of July, 1816, or in respect of the purpose for which the sale was made, or otherwise to enter into such contract on behalf of the defendant: and that he had abandoned his interest in the premises, or had ever signed any such agreement. It was also denied that Strickland had succeeded Stokes as the defendant's solicitor, except for certain purposes mentioned in the answer, in proof of which he referred to Stokes's bill of costs delivered to him: and he alleged that Strickland had no general power or authority to act for him, and that he had no special authority to act in respect of the sale of the defendant's interest in the said estate—that Strickland was the attorney of Daniel Baker and his wife; and that if he did in fact write or signify his approval of the draft, he did so under some mistake or misapprehension, as the defendant never gave him any authority to do so.

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Roupell, in support of the order for dissolving the injunction, submitted that in this case there was no privity between the plaintiff and defendant, and that whatever contract the plaintiff might have entered into with other persons, as to the other tenant for life or those in remainder, there was nothing to bind Grayall; and he ought not to be *kept out of possession of his estate, because money which he might or might not be liable to pay, had been paid by another person without his consent.

RICHARDS, C. B. (relieving the counsel for the plaintiff):

The great difficulty is that it is not denied that a considerable sum of money due in respect of this property from persons who were liable to pay it *ratione tenuræ* was, in fact, paid by the plaintiff, in consideration of having the estate; and it is clear that any one placing himself in the situation of a party entitled to the property, and liable to be first called on to pay off a

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burthen on it, by discharging it must also be considered in equity as in his situation, also, in respect of the title to hold it. Without therefore saying, whether the agreement relied on can be made out or not, or what may be the effect of it, that is quite sufficient ground for us to interfere at present, to prevent the possession being changed. The plaintiff, supposing him to be a perfect stranger, has paid a large sum of money, to the payment of which the defendant was liable, and on that consideration he claims a right to keep possession of the property. The defendant certainly had a right to bring the ejectment; but the plaintiff had an equal right to file this bill. It prays a specific performance of an alleged agreement. Whether there was any such or not, or whether it were valid, is a question for another stage of this proceeding. Enough appears for the present on the bill and answer, to authorise us to prevent as yet at least any change of possession. The principal *ground on which I proceed is, that it is clear that an existing charge on the property has been discharged by the plaintiff, and that the defendant has had the benefit of that discharge. The plaintiff has therefore an undoubted lien at least, and, from the result of his dealing with the Bakers, is in a situation to be entitled to be considered under all the circumstances as a mortgagee as against the defendant.

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The question, whether the defendant is only, as he says, liable to keep down the interest, must be discussed in a more formal manner; but in the mean time, we cannot suffer him to turn the plaintiff out of possession, by the effect of the proceedings at law, merely because his title is only an equitable one, when it is not denied that he or the Bakers, through his means, have cleared the defendant's estate from the charges to which it was undoubtedly subject.

GRAHAM, B. :

It is clear that some agreement must necessarily have taken place between Grayall and the Bakers, in consequence of the enormous and pressing incumbrances upon the property; and the agreement with Cawthorn shows that Grayall felt himself unequal to the burthen of the charge, and incapable alone of meeting the heavy demands made on him in respect of it. If

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so, it would be unfair to deprive the person, by whom the money has been advanced to meet the exigencies of the occasion, of the possession of the property, on the faith of which he paid off the charge. *Whatever questions there may be respecting the rights of the parties, they will still remain to be formally investigated, when the defendant may establish his case by evidence. For the present, I have no hesitation in saying the injunction must be continued.

WOOD and GARROW, Barons, expressed themselves of the same opinion.

Order discharged : injunction continued.

It was suggested that the defendant might still be permitted to enter up his judgment, to which the Court assented.



1822.
June 11.

[68]

IN THE MATTER OF W. I. CLEMENT.

(11 Price, 68.)

[In this case the legality of a fine imposed by the King's Bench was brought into question before the Court of Exchequer. That Court gave judgment in favour of the legality of the fine, and in effect confirmed the reasons of the judgment of the King's Bench as previously reported : *The King v. Clement*, 23 R. R. 260 (4 B. & Ald. 228).]

LITTLEWOOD *v.* CALDWELL.

(11 Price, 97—99.)

1822.
June 12.

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Where a defendant in a suit, founded on charges of misconduct, for an account and a dissolution of the partnership and for an injunction to restrain him from receiving debts, drawing bills, &c. or further interfering in the partnership concern, denied or explained facts of appropriation to his own use of debts received by him from persons indebted to the concern, and alleged that he could not put in his answer to the bill because the plaintiff had possessed himself of the partnership books, and carried them away from the partnership premises, the Court refused to grant the injunction, on the ground of the plaintiff having acted improperly.

FLATHER moved for an injunction in this case to restrain the defendant from further interfering in the partnership business, receiving debts, or drawing bills, &c., and for an account and dissolution of the partnership, on a bill filed for that purpose, supported by an affidavit made by the plaintiff, stating, that he and the defendant had been partners from the year 1805 till the time of filing the bill, and that no deed or articles of copartnership had ever been executed between them, and no period fixed for the duration of the partnership; that the plaintiff had invested in the concern a capital of 3,103*l.*, while that invested by the defendant amounted to 581*l.* only; that since July, 1816, the account had never been balanced; that in February, 1822, the plaintiff gave the defendant notice in writing that the partnership should cease and be dissolved in one month from that time; that after that notice, they agreed that an account of stock, and the balance of the partnership accounts, should be taken by two persons named on either side; that that was done, and that it thereupon appeared that the plaintiff's share in the capital and profits of the concern amounted to 2,495*l.* and that the defendant had drawn out of the concern his own share, and 128*l.* beyond, which he had *applied to his own use; and that he had since clandestinely received several sums of money due from debtors to the concern, which he had not entered in the partnership books, but had applied to his own use, and was therefore considerably indebted to the concern.

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The defendant also filed an affidavit stating, that the accounts so taken were not conclusive, but were to be subject to examina-

LITTLEWOOD v. CALDWELL. tion; that the plaintiff had taken and carried away the partnership books from the premises where the business was carried on, and had refused the defendant access to them; and that the defendant had received money due from persons indebted to the concern, but that he had applied it to the payment of debts due from themselves, and not to his own use, and that those sums had not been entered in the partnership books by him, because the plaintiff had removed them; and that he was for the same reason unable to prepare and put in his answer.

[*99] In support of the motion it was urged, that the partnership must be considered as dissolved by the effect of the notice; for where partners are not under an express agreement that the partnership shall continue for any precise duration of time, it may be dissolved on notice at any time, on the accounts between them being wound up, and the balance fairly struck: *Peacock v. Peacock*,† *Featherstonhaugh v. Fenwick*.‡ It was therefore *submitted, that under the circumstances disclosed in the affidavits, the plaintiff was entitled to the injunction prayed.

Cooper, for the defendant, contended, that the plaintiff was not, under the circumstances of this case, in a condition to ask for the interference of the Court as prayed.

RICHARDS, C. B. :

We cannot at present, in this state of the case, grant the injunction. Whether we ought to dissolve the partnership, under the circumstances before us, is a very considerable question. [His Lordship stated the circumstances from the affidavits.] On one side a misapplication of money received from persons indebted to the concern is charged, on the other hand that is denied, and the sums accounted for. The defendant also states in his affidavit, that the plaintiff took away the partnership books, and that is not denied. That was certainly committing an unwarrantable outrage on the partnership property, to which he had no more right than the defendant, and it

† 10 R. R. 138 (16 Ves. 49).

‡ 11 R. R. 77 (17 Ves. 298).

deprives the plaintiff of any claim to the favour of the Court. LITTLEWOOD
Under the circumstances, therefore, we refuse the motion, with- CALDWELL.
out prejudice, however, to any future application which may
hereafter be thought advisable to make.

The rest of the Court concurred.

Injunction refused.

1822
June 26.

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JONES v. STEVENS.

(11 Price, 235—283.)

Evidence (in Actions for Libel and Slander).—In an action for a libel on the plaintiff, tending to injure his credit and reputation in his profession and business of an attorney, and defamatory of him in his said profession and business, it was held to be sufficient evidence of the plaintiff being an attorney, that it was proved by the book of admissions produced by the proper officer, and that he practised as an attorney.

It was also decided to be no objection to maintaining such an action, that it appeared in evidence that during the time of the grievances stated in the declaration, the plaintiff had omitted to take out his certificate as required by the 37 Geo. III. c. 90† for more than a year; but that he might still sue as an attorney for damages in consequence of a libel imputing improper conduct to him in his character of attorney.

Statements made in a libel have the effect of dispensing with proof, on the part of a plaintiff, of facts so stated, if they become necessary to support the plaintiff's case.

General evidence of the plaintiff's bad character and ill repute in his business as a practising attorney can not be admitted either to contradict the allegation in the declaration, that the plaintiff during, &c. exercised and carried on the business of an attorney, with great credit and reputation, with a view to mitigating damages on the general issue, or in support of averments in the defendant's pleas pleaded by way of justification that the plaintiff was a disreputable professor and practitioner in the law.‡

Pleading in Actions for Libel and Slander.—In declarations in actions for libel no unnecessary averment should be introduced, and regard should be had, in drawing such declarations, to the libel itself, which is now admissible as proof of all that is positively averred therein.

Pleas by way of justification, generally aspersing the character of the plaintiff by averments, without stating particular acts of bad conduct apposite to the justification of the defendants, are not only demurrable, but ought to be demurred to, as due to the Court and to the Judge before whom the action may be tried.§

It is an erroneous notion that by demurring to a plea of justification the plaintiff necessarily admits the truth of the slanders in a libel. That which is well pleaded only is admitted.

THE plaintiff in this action on the case [for damages for a libel], which was tried before the Lord Chief Baron at the last

† Repealed 33 & 34 Vict. c. 99. But the provisions of 6 & 7 Vict. c. 73, s. 26, are to a similar effect, so far as relates to the point in question.—R. C.

‡ The ruling on this point is questioned by CAVE, J. (in a judgment concurred in by MATHEW, J.) in *Scott v. Sampson* (1882) 8 Q. B. D. 491,

500—503; 51 L. J. Q. B. 380, 384, *et seq.* The authority of *Scott v. Sampson* is again questioned by HAWKINS, J. in *Wood v. Earl of Durham* (1888) 21 Q. B. D. 501, 507, 57 L. J. Q. B. 547. See now also R. S. C. Ord. XXXVI. r. 37, and *Scarf v. Kemp* '92, 2 Q. B. 319, 61 L. J. Q. B. 515.—R. C.

§ The ruling on this point is re-

sittings for Middlesex, obtained a verdict, damages 50*l.*—the learned Judge reserving leave to the defendant to move that a nonsuit might be entered on the points of law reserved.

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In the early part of the Term, on the motion of **Brougham* on the part of the defendant, the Court granted a rule to shew cause why the verdict should not be set aside, and a nonsuit entered, or why there should not be a new trial had, on the several objections which had been taken at *Nisi Prius*, arising upon the pleadings and the evidence given on the trial.

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The declaration stated after the usual inducement that the plaintiff was a good, true, honest, just, and faithful subject of this realm, and as such had always hitherto behaved and conducted himself, and, until the committing the several grievances by the defendant as therein after mentioned, was always reputed, &c. to be a person of good name, fame and credit, to wit at, &c. that at the time of committing the said grievances was, and for divers, to wit, ten years before that time elapsed had been, and still was an attorney of the Court of our lord the King of the Bench at Westminster aforesaid, and the profession and business of an attorney during *all* the time aforesaid, used, exercised and carried on as well at Hanley in the county of Stafford, as at Stafford in the said county, with great credit and reputation, to wit, at Westminster, &c. aforesaid, and that before the committing of the said grievances, the said plaintiff had commenced certain actions in his Majesty's Court of Exchequer, at Westminster, upon a certain bond or written obligation called a bail bond, against one Samuel Leake and certain other persons who had entered into the said bond, as bail or sureties for the said Samuel Leake, the costs in which said actions had **by* the proper officer of his Majesty's said Court been taxed at a certain sum of money, to wit the sum of twenty-one pounds seventeen shillings and sixpence, the taxation of which said costs had been attended by a certain person by the said plaintiff, before that time retained and employed as the agent of the said plaintiff, in that behalf, to wit, at Westminster aforesaid, in the county last aforesaid, yet the said defendant

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ferred to and applied by KAY, L. J. Q. B. 183, 189, 63 L. J. Q. B. 89, 92 in *Zierenberg v. Labouchere* '93, 2 C. A.—R. C.

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well knowing the premises, but contriving and wickedly and maliciously intending to injure the said plaintiff in his credit and reputation, in his said profession and business of an attorney as aforesaid, and to cause it to be suspected and believed that he the said plaintiff had conducted himself dishonestly and improperly in his said profession and business of an attorney, and to vex, harass, impoverish, and wholly ruin him the said plaintiff, heretofore, to wit, on the 11th day of February, in the year of our Lord one thousand eight hundred and twenty, to wit, at Westminster aforesaid, in the county of Middlesex aforesaid, wrongfully, maliciously, and injuriously did compose, print, and publish, and cause and procure to be printed and published, a certain false, scandalous, malicious and defamatory libel of and concerning the said plaintiff in the way of his said profession and business of an attorney, and of and concerning the said actions, so by him commenced against the said Samuel Leake and his bail on the said bond or written obligation as aforesaid, and of and concerning his the said plaintiff's conduct in those actions, and of and concerning the costs thereof, in which said libel was and is contained, amongst other things the

[*238] *false, scandalous, malicious, defamatory and libellous matter following, of and concerning the said plaintiff, in the way of his business and profession as an attorney, that is to say, "It is but justice to say that the agent (thereby meaning the person employed by the said plaintiff as his agent in the said actions so commenced by him, against the said Samuel Leake and his bail as aforesaid), whom I am told by a friend is a respectable man, admitted that he (meaning the said agent of the said plaintiff as aforesaid) individually scorned to take the money, but his client insisted on it. Now know, learned reader, that this immaculate client (meaning the said plaintiff) is Thomas Jones of Hanley in the Potteries, with reference to whose character and conduct I refer you to his neighbours; he is a man who, if you allow to speak for himself, is more sinned against by other men than he sins against them. He carries on business (meaning the said business and profession of an attorney) at Hanley, and he had an assistant, in a cheap shop at Stafford, to carry on his business there, one of the tribe of journeymen tanners of the name

of Hammond. They rioted for a long time in their practices with profits satisfactory to both, and the most benignant sensations towards each other; at length they quarrel, and their newspaper press groaned under their reiterated accusations, till Jones got the start of Hammond, and indicted him for not keeping the books with the accuracy that the King's accountants do, and Hammond was transported at the last Stafford Sessions. While concord prevailed, they were *par nobile fratrum* * (thereby meaning and insinuating that the said plaintiff was of as bad and infamous a character as the said Thomas Hammond), but poor Hammond cannot now, if he wished to do it, send for Exchequer subpoenas to warrant cognovits dated forward and kept back till the writ arrived which legalised them, and enabled him by the next post to send for an execution. On Hammond's trial several gentlemen and commoners, moved by malice and the instigation of the devil (no doubt Jones would say), ventured to swear that they would not believe Jones on his oath, and if the reader refers to the *Staffordshire Advertiser* of the 15th of January, he will find some ludicrous reasons assigned as the grounds of their disbelief.

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“Mr. Jones attacked these witnesses in the next *Staffordshire Advertiser*. His philippic clearly proves he does not always write English, however he may have been injured, and it seems now the jackall (meaning the said Thomas Hammond) is gone, the lion is short of provender; for we find at the end of his letter an advertisement for business, in these words: ‘P.S. Informations of acts or expressions of certain individuals indicative of hostilities towards me will be thankfully received from respectable persons at my offices, at Hanley and Stafford.’”

There were four other counts in the declaration, in each of which the libel was charged to be “of and concerning the plaintiff in the way of his aforesaid profession and business of an attorney.” The declaration concluded thus: “by means of the committing of which said several grievances by the said defendant as aforesaid, the plaintiff had been and was greatly injured in his said good name, fame and credit, and brought into public scandal, infamy and disgrace, with and amongst all

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his neighbours and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects, to whom the innocence and integrity of the said plaintiff in the premises were unknown, have, on occasion of the committing of the said several grievances by the said defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe the said plaintiff to have been and to be a person guilty of improper and unprofessional conduct in the exercise of his aforesaid business and profession of an attorney as aforesaid, and have, by reason of the committing of the said several grievances by the defendant, from thence hitherto wholly refused and still do refuse to have any transaction, acquaintance or discourse with him the plaintiff, as they were before used and accustomed to have, and otherwise would have had, and he the plaintiff hath been and is by means of the premises aforesaid greatly injured, prejudiced, aggrieved and damnified, to wit, at," &c.

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The defendant pleaded the general issue, and also by way of justification the following special pleas: first, that theretofore and before the committing of the said several supposed grievances, in the 1st count of the declaration mentioned, or any *part thereof, to wit, on the 1st of January, 1819, at, &c. one Thomas Dax, being then and there a respectable man, and the person employed by the said plaintiff as his agent in the said actions so commenced by him against the said Samuel Leake and his bail, as in the said declaration mentioned, said, published and admitted, that he the said Thomas Dax individually scorned to take the said sum of money, at which the said costs in the said actions had been so taxed, as in the said declaration mentioned, but his client insisted on it—averring that the plaintiff theretofore and before the committing of the said several supposed grievances, to wit, &c. (1st January, 1816) and from thence, &c. until, &c. (1st January, 1819) had an assistant, that is to say, the said Thomas Hammond, in the said declaration mentioned, who then and there was an assistant of the said plaintiff so being such attorney as in the said declaration mentioned, in a cheap shop at Stafford aforesaid, that is to say at Westminster aforesaid, in the county aforesaid, to carry on therein, and that the said Thomas Hammond, as such assistant, then and there

carried on therein his the said plaintiff's business of an attorney; and that, during all the time last aforesaid, the said plaintiff and the said Thomas Hammond there lived and conversed together in habits of good intimacy, familiarity and friendship, until heretofore and before the time of the committing of the said several supposed grievances or any part thereof, to wit, &c. (on the 1st February, 1819) the plaintiff and the said Thomas Hammond quarrelled, to wit, at Westminster, &c. and then and there published *divers, to wit, fifty accusations each against the other in divers, to wit, ten newspapers, and thereupon afterwards and before the time of the committing of the said several grievances or any part thereof, to wit, at the session of the peace held in and for the said county of Stafford next before the said last mentioned time, to wit, on the 13th of January, 1820, the said plaintiff caused and procured the said Thomas Hammond to be indicted for a certain offence, cognizable by the laws of this realm, for which he was liable to be transported. And such proceedings were thereupon had that afterwards, to wit, on the same day and year last aforesaid, at a session of the peace duly held in and for the said county of Stafford, to wit, at Westminster aforesaid, the said Thomas Hammond, was by due course of law tried upon the said indictment for the said offence and duly convicted thereof, and sentenced to be transported for the same. And further averring that upon such trial of the said Thomas Hammond, for the offence aforesaid, to wit, on, &c. at, &c. several gentlemen and commoners, that is to say one John Caithness, one John Clare, one Ralph Stevenson, one Thomas Taylor, and one Thomas Mayer ventured to swear, and then and there did swear, that they would not believe the said plaintiff on his oath, and in a certain newspaper called the *Staffordshire Advertiser*, of the 15th of January, in the year of our Lord 1820, certain ludicrous reasons were and are mentioned and assigned as the grounds of the said disbelief of the said John Caithness and of the said John Clare, to wit, at Westminster aforesaid, in the county aforesaid. *And further, that in the said newspaper called the *Staffordshire Advertiser* as aforesaid and published next after the said *Staffordshire Advertiser* of the 15th of January aforesaid, to wit, on the 22nd day of January, in the year of our

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Lord 1820, the said plaintiff did print and publish a certain letter of him the said plaintiff, containing an attack on the said persons who had so sworn as hereinbefore mentioned, written in part thereof ungrammatically and in bad English, and that at the end of the said letter there was an advertisement for business in these words (&c. &c. as in libel set out above from "P.S.," *ante*, p. 717 to the end).

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The second special plea was, that heretofore and before the committing of the said several supposed grievances in the said declaration mentioned, or any part thereof, to wit, on the 1st of January, 1810, to wit, at Westminster aforesaid, one Thomas Dax admitted that he the said Thomas Dax individually would not have taken the said sum of money of which the said costs in the said actions had been so taxed as in the said declaration mentioned, but his client insisted on it: and the plea averred that the plaintiff had an assistant, that is to say the said Thomas Hammond, who then and there was an assistant of the said plaintiff so being such attorney as in the said declaration mentioned, in a certain cheap office there, to wit, at Stafford aforesaid, to carry on therein, and that the said Thomas Hammond, as such assistant as aforesaid, then carried on therein his the said plaintiff's business of an attorney, at Stafford aforesaid, *to wit, at Westminster aforesaid, and that the said plaintiff caused and procured the said Thomas Hammond to be indicted for a certain offence cognizable by the laws of this realm and for which he was liable to be transported, and such proceedings were thereupon had, that afterwards, to wit, on the same day and year last aforesaid, at a session of the peace duly held in and for the county of Stafford, the said Thomas Hammond, was by due course of law tried upon the said indictment for the said offence, and duly convicted thereof, and sentenced to be transported for the same, to wit, at Westminster aforesaid, in the county aforesaid: and it further averred, that before the said plaintiff and the said Thomas Hammond quarrelled as aforesaid, and before the said Thomas Hammond was indicted as aforesaid, the character of the said plaintiff was in no respect better or more respected than the character of the said Thomas Hammond, and that the said plaintiff was held and reputed by and amongst his

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neighbours, and other good and worthy subjects of this realm to whom he was known to be a *disrespectable professor and practitioner in the law*, that is to say a person who conducted and carried on *his profession of an attorney* upon the principle of no cure no pay, that is to say, that in case the said plaintiffs did not succeed in the business, matters and things which he was employed by his clients to transact and perform, that he the said plaintiff would make no charge on his clients for the same: and further, that on the said last mentioned trial of the said Thomas Hammond for the offence last aforesaid committed by *him, several gentlemen and commoners, to wit, the said John Caithness, the said John Clare, and the said Ralph Stevenson, ventured to swear, and did then and there swear that they would not believe the said plaintiff on his oath, and in a certain newspaper, to wit, the *Staffordshire Advertiser*, of the 15th of January in the year of our Lord 1820, certain ludicrous reasons were and are mentioned and assigned as the grounds of the said disbelief of the said John Caithness, and of the said John Clare. And the said defendant further saith, that in the said newspaper called the *Staffordshire Advertiser* of the 15th of January aforesaid, to wit, on the 22nd day of January in the year of our Lord 1820, the said plaintiff did print and publish a certain letter of the said plaintiff containing an attack on the said persons who had so sworn as hereinbefore mentioned, which was not throughout English, and that at the end of the said letter there then and there was a certain advertisement by way of postscript for business, to wit, as follows, [as in libel from “informations of acts” to “my offices at Hanley and Stafford.”] Wherefore he the said defendant afterwards, to wit, at the said several times, when &c. in the said declaration mentioned, to wit, at Westminster aforesaid, in the county aforesaid, did print and publish, and cause, and procure to be printed and published the said several supposed libels in the said declaration mentioned, in manner and form as therein mentioned, as he the said defendant lawfully might for the cause aforesaid, and this he the said defendant is *ready to verify, wherefore he prays judgment if. &c.

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The defendant pleaded, thirdly, as to the printing and publishing and causing, &c. all the said several supposed libels in the

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declaration mentioned, except as to such part thereof as contained the words following, "their newspaper press groaned under reiterated accusations," and also such as contained the words following, "While concord prevailed they were *par nobile fratrum*" *actio non*, &c. because, &c. [proceeding as in the first plea pleaded by way of justification till the words "insisted on it."!] The plea then averred that the plaintiff had an assistant, to wit, the said Thomas Hammond in the said declaration mentioned, who then and there was an assistant of the said plaintiff so being such attorney as in the said declaration mentioned, in a cheap shop at Stafford aforesaid, that is to say at Westminster aforesaid, in the county aforesaid, to carry on therein, and that the said Thomas Hammond as such assistant did then and there, to wit, at Stafford aforesaid, carry on therein his the said plaintiff's said business of an attorney, on certain cheap, irregular, unprofessional and disreputable terms and conditions, to wit, the terms and conditions following, that is to say that if the client or clients of the said plaintiff should not succeed in the suit or suits instituted on their or his behalf by the said plaintiff, he the said plaintiff should not, nor would demand or require any costs or remuneration in or for conducting the *said suit or suits from his said client or clients therein, to wit, &c. This plea concluded with nearly the same averments as the first special plea, commencing with the allegation that the plaintiff caused Hammond to be indicted, &c. &c. wherefore, &c. (justifying as before).

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The fourth special plea averred, generally, that the several supposed matters and things in the said several supposed libels in the said declaration mentioned, contained at the respective times of the printing and publishing thereof, were and are, and each and every of them, then was and is true, to wit, at Westminster aforesaid, in the county aforesaid, wherefore he the said defendant at the several times when, &c. in the said declaration mentioned did print, and publish, and cause, and procure to be printed and published, the said several supposed libels in the said declaration mentioned, in manner and form as therein mentioned, as he lawfully might for the cause aforesaid, to wit, at Westminster aforesaid, in the county aforesaid. And this he the said defendant is ready

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to verify: wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him.

The plaintiff replied to the special pleas *de sua injuriâ absque causâ*, upon which issues were taken.

The two objections made and reserved on the trial, on which that part of the application which sought to enter a nonsuit was founded, were,

First, that it had not been sufficiently proved on the trial in support of the averments in each count of the declaration, that the plaintiff was at the time of publishing the alleged libel, and during the period mentioned in the declaration, an attorney of the Court of King's Bench, and legally entitled to practise; but that it was proved on the contrary that he had during all that time no legal right or authority to practise as an attorney, with reference to the statute of the 37th of Geo. III. c. 90.†

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It was urged upon the objection founded on this statute, that the plaintiff not being an attorney legally entitled to practise during the time stated in the declaration, the action which was for a libel on him in his character and business of an attorney, as charged in every count of the declaration, could not be sustained.

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It was also contended that the averment in the first count of the declaration, that the plaintiff had commenced the actions there alleged to have been commenced by him on the bail bond, had not been well proved: nor had the execution of the bail bond; or the taxation of the costs been proved, which formed part of the averments in the same count—and that, consequently, the action could not be maintained, as the declaration had not been supported by sufficient evidence, so many material averments not having been proved.

A third objection was now taken to the verdict, and urged as a ground of motion for a new trial, arising on the rejection by the LORD CHIEF BARON at the trial of evidence offered on the part of the defendant—in support and proof of his second and last pleas, by way of justification, and in contradiction of the averment in the declaration, that the plaintiff had used, exercised

† See now 6 & 7 Vict. c. 73, s. 26.

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and carried on the profession and business of an attorney with great credit and reputation—that the plaintiff was of general bad character and repute in his practice and business of an attorney, as stated generally in the terms of the pamphlet, and alleged in the particular *special pleas by way of justification. It was now contended that such evidence ought to have been received, and in support of that ground of the present application the defendant's counsel cited the cases of *The Earl of Leicester v. Walter*,† — *v. Moor*,‡ *Williams v. Callendar*,§ in all of which cases such general evidence had been admitted upon the general issue in mitigation of the charge, and to diminish the damages.

There was a fourth objection made on the point of rejected evidence, as the LORD CHIEF BARON had refused to admit a Staffordshire newspaper tendered in proof of the allegation, in the three first pleas pleaded by way of justification, that the plaintiff published therein an attack on the several persons, who had sworn, on the trial of Hammond, that they would not believe Jones on his oath; and that he had procured to be inserted therein, the advertisement stated in some of the pleas to have been published by him.

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The LORD CHIEF BARON now read his report of the evidence, from which it appeared that one writ and three declarations against the principal and his bail had been produced, to shew that certain actions had been brought by the plaintiff against Leake and his bail, as stated in the declaration, and three allocaturs of the costs taxed in the same actions were also put in and proved. A witness then proved the publication of the libel, a *copy having been sold to him by the defendant, on the 23rd of December, 1821. The plaintiff next called the officer of the Court of Common Pleas, who proved the admission of the plaintiff as an attorney, and the enrolment of his admission in the year 1810. On his cross examination, he stated that he officially kept the book in which the certificates of attorneys admitted of that Court were entered, and that there was no

† 2 Camp. 251 [overruled, *Scott v. Sampson* (1882) 8. Q. B. D. 491].

‡ 1 M. & S. 284.

§ Holt, N. P. 307, and *Mills v. Spencer*, Holt, N. P. 534.

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entry of any certificate obtained by the plaintiff from November, 1813, to November, 1814, nor from November, 1821, to the 21st of February, 1822, when the last entry of any certificate obtained by the plaintiff was made. The plaintiff's law agent in town proved that he had during the period mentioned in the declaration, carried on business and practised as an attorney.

On this evidence, on the part of the plaintiff, the objections to its sufficiency stated above were made and overruled, but the LORD CHIEF BARON reserved the points.

The report also stated that witnesses were proposed to be called on the behalf of the defendant to prove that the plaintiff was a person of evil repute and bad character as a professional practitioner, whose testimony the CHIEF BARON refused to receive, as being wholly inadmissible.

Jervis, Taunton, and Cross, now shewed cause :

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As to the first objection, they submitted that it *was not necessary for the plaintiff in support of the present action, to give in evidence, in proof of his being an attorney, his certificates or the years during which he was alleged in the declaration to have been an attorney, insisting that it was quite sufficient, *primâ facie*, to shew that he had been admitted an attorney, and that he practised; and that it would then be incumbent on the defendant to disprove that, or give evidence of the plaintiff's neglect in not having taken out his certificate, or procured it to be duly entered, if either were requisite to be done, and thus to negative such necessary qualification of the plaintiff's admission as an attorney as averred in the declaration.

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They also contended that it was now sufficiently established by the authority of decided cases, that where a person was in actual practice as an attorney, it was not necessary to prove even that he was admitted, by a copy of the roll, or that he had duly observed any formality necessary to enable him to practise legally: and they cited *Berryman v. Wise*,† and a recent case determined in this Court,‡ wherein it was decided, on the authority of *Berryman v. Wise*, that the plaintiff, in an action

† 2 R. R. 413 (4 T. R. 366).

‡ *Bagnall v. Underwood*, p. 766 post.

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for a libel, is not called upon to prove that he is legally invested with the particular character in respect of which he has been libelled by a charge of misconduct in exercising the functions of that character. On the same point they cited also the *case of *Smith v. Taylor*,† and *Lewis v. Clement*,‡ where the present CHIEF JUSTICE of the King's Bench so ruled at Nisi Prius on that preliminary objection being taken at the trial: and they adverted to the case of *Prior v. Moore*,§ that it had been determined that an attorney might sue by attachment of privilege, although his certificate had expired; so that a man may still be an attorney although he may not legally carry on suits for others. The provisions of the 37 Geo. III. c. 90, they insisted were all mere matter of regulation, as connected with the stamp duty imposed on the certificate, imposing penalties and disabilities on attorneys who should practise without, and the terms of those very provisions recognized the character of attorney as still subsisting although they should not have been complied with.

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On the second point, they insisted that the production of the writ, and three declarations thereon, with three rules to plead, and three allocaturs of the taxed costs, was sufficient evidence of three actions having been brought, and of the costs on them having been taxed; but they submitted that, notwithstanding the allegation in the declaration was, that certain actions had been brought, it would have been quite sufficient to have shewn that one action had been brought, for that would satisfy the utmost exigency of the averment. That part of the averment stating that they were brought on a bail *bond, it was urged was merely incidental, and therefore the execution of the bond need not in any respect be proved. But they further insisted that the allegations in the libel rendered it wholly unnecessary to prove any thing which was stated there, or assumed: and in this case the libel itself charged that the plaintiff issued a writ against the bail; and that the defendants in the action on the bail bond were served with notices that declarations were filed against them.

† 1 Bos. & P. (N. R.) 196.

§ 2 M. & S. 605.

‡ 22 R. R. 530 (3 Barn & Ald. 702).

(It was objected that, as that part of the pamphlet was not referred to in the pleadings, or read in evidence, it could not now be adverted to ; but

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The Court determined that as the whole pamphlet was put in it might have been all read at the trial, and therefore any part of it might be referred to now.)

As to the objection made to the verdict, founded on the rejection of the defendant's evidence tendered of the plaintiff's general bad character, the point on which the new trial was moved for, and which the plaintiff's counsel treated as the defendant's main ground, in support of the alternative of the present motion, they insisted that such evidence was wholly inadmissible, and that whatever dicta might be found in the books, in support of such a doctrine, all the sound principles of law were opposed to it, and that the greatest mischief and inconvenience would result from holding that defendants might, by putting such pleas, by *way of justification on the record, impose on plaintiffs the burthen of such indefinite proof.

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(Wood, B. : I have very much considered these pleas, and I must say, that I never saw any such before, and hope never to see any like them again. I cannot refrain from thus reprehending them by particularly expressing, in this distinct manner, my marked disapprobation. They are all demurrable, and it was an abuse of the Court to put them on the record.† In requiring the signature of counsel to special pleas, the Courts expect that they will not put their hands to such pleas as these. It was formerly the practice to apply to the Court for leave to file such pleas by way of justification, as are now only made to require the sanction of the name of counsel from the confidence which the Courts repose in their discretion. The object of the care and caution required to be used in such pleadings as are allowed to be signed by counsel, is that they should be so framed as that Judges may

† It was stated at the Bar, that the plaintiff did not demur to the pleas, because he was desirous that his

general good character should be put in issue.

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know what it is they have to try, and that *facts* only should be put in issue. Thus, if you charge bad character, you must state on what particular acts you found the assertion. How, otherwise, can there be anything to try. I hope that all the Courts will revive the ancient practice, by making a rule that no plea by way of justification, shall be put on the record, without the leave of the Court being first obtained. I speak advisedly in *saying this, and I have no hesitation in thus expressing myself on this subject.)

It was urged that there was nothing in the usual allegation in the declaration of the plaintiff's good name and fame to warrant such pleas, by which new libels were put upon the very record. In the cases which had been cited as authorities, to shew that general evidence might be given of a plaintiff's bad character, to contradict the allegation of good fame, in mitigation of damages, there was some specific charge stated in the libel, which proof of the general bad character of the plaintiff in that particular respect might therefore in some measure extenuate.

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As a general principle, however, it was established that no such evidence could be received, because it would be generally inconvenient and most difficult to repel it by counter testimony. For that reason it has been held that such a general mode of justification is "contrary to every rule of pleading," and therefore that such a plea was "bad on account of its generality." That is the doctrine of the case of *J'Anson v. Stuart*;† and in a case of *Snowdon v. Smith*,‡ reported by way of note to the case of — v. *Moor*, it is stated to have been ruled by CHAMBRE, J. that on a general plea in justification, a witness could not be asked whether there were not reports imputing to the plaintiff the charge *which the defendant had said that he had heard respecting him, distinguishing that case from the case of *The Earl of Leicester v. Walter*, because in the latter, the defendant had by his plea put the issue upon the truth of the charge imputed. So here the issues are in general justification, and not upon the truth of any particular charge imputed, there being in

† 1 R. R. 392 (1 T. R. 748).

‡ 1 M. & S. 286, n.

fact none such in the libel. As to the case of — v. *Moor* itself, the true ground of the determination was, that the plaintiff had chosen to be nonsuited.

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It was stated that the doctrine of the case of *The Earl of Leicester v. Walter*, and the determinations on which MANSFIELD, Ch. J. with doubt and reluctance proceeded in so ruling the point, had never been approved, and a recent case (not in print) of *Waithman v. Shackell* and others,† was referred *to, where it was said that the present Chief Justice ABBOTT had expressed his disapprobation of these decisions, and objected to admit evidence of the existence of injurious reports said to be in circulation, to the prejudice of the plaintiff, tendered in order to diminish the amount of damages.

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(GARROW, B. mentioned from recollection two cases, one of *Williams v. Faulder*, and another (who called himself *Anthony Pasquin*) the name of which his Lordship did not state, neither of which were ever in print. In the former his Lordship, then at the Bar, proposed to read out of one of the plaintiff's own works (the book which was the subject of the action) in defending an action brought for a libel on him as a writer to shew that he was a defamatory writer, or a writer of defamatory works, which was permitted by Lord *KENYON. In the other it was proposed to ask a witness who was supposed to be acquainted with the meaning of certain expressions, insignificant in themselves, but which were intended to convey matter of deep reproach, but Lord ELLENBOROUGH repressed the question with much impatience.)

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Another objection to this sort of evidence being received in this case, they submitted, was that it was not merely offered in proof of the plaintiff's general bad character, but to prove that he was as bad as another person (Hammond) named in the libel.

As to the rejection of the evidence of the newspaper, it was said that that evidence was not rejected as not being admissible evidence, but as not being proved as stated.

† Reported s. n. *Waithman v. Wea-* N. P. 10, also reported in note to
ver, p. 770 *post* (Dowl. & Ry. *Jones v. Stevens*, 11 Price, 257).

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Brougham, Bayly, Abraham and Whateley, in support of the rule, still insisted on the minor objections already stated, particularly that of the plaintiff not being legally entitled to practise as an attorney; for that he would not be capable of supporting an action for damages sustained on account of an injury suffered in doing what he had not a legal right to do. As well might a smuggler attempt to maintain an action for injury done to him as a trader, by proving loss incurred in a course of contraband dealing.

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They relied, however, principally on the main objection, of the rejection, by the learned Judge, *of the evidence tendered on the part of the defendant to prove the general bad conduct and character of the plaintiff as an attorney: and they adverted to the case already cited, as establishing that such evidence was admissible, adverting particularly to the language of Lord ELLENBOROUGH in the case of — v. *Moor*;† for although that decision proceeds on the election of the plaintiff to be nonsuited, yet Lord ELLENBOROUGH there states in terms that “A person of disparaged fame is not entitled to the same measure of damages as one whose character is unblemished: and it is competent to shew that by evidence.” BAYLEY, J. also says (and it is the whole which is attributed to him in delivering judgment), “It was certainly evidence in mitigation of damages.” Although, therefore, the Court refused the rule on the particular ground, the proposition on which the motion was made—that inadmissible evidence had been improperly let in—was distinctly denied. In this case the evidence, if not admissible under the special pleas by way of justification, ought to have been admitted in mitigation of damages on the general issue, which, being *alio intuitu*, is distinct from, and independent of the special pleas in justification, which could not, therefore, be considered to have the effect of narrowing in any respect the evidence admissible on the part of the defendant, in diminution of the injury alleged to be suffered by the plaintiff, as the *gravamen* of his action. The case of *Lord Leicester v. Walter*, supported *as it was by the two cases cited there, overthrowing the doubt of MANSFIELD, Ch. J. which was grounded on the same arguments as have been this

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day urged against its admissibility is quite decisive on this point. [They endeavoured to distinguish this case from that of *Waithman v. Weaver*.] On the general issue the plaintiff is under the necessity of proving his whole case: and, if any part of it be disproved, it would be material in assessing the amount of damages, if the plaintiff should be proved to have been damnified, which would put aside the pleas by way of justification. The allegation in the declaration of good character, till the libel complained of was published, lets in evidence to contradict it: and nothing can be more easy of proof than that which every man ought to be at all times prepared to prove—a generally good reputation.

(GRAHAM, B. : That is an allegation, I apprehend, which could not be traversed.)

The allegation (it was submitted) was altogether unnecessary, and might be safely omitted, as was now the more usual mode of declaring, for the purpose of avoiding the necessity of proving it and the letting in counter testimony; but, being introduced, it would require to be proved, and would render testimony to contradict it admissible.

On the whole they contended that the plaintiff ought to be nonsuited: or if not, that there should be a new trial, on the ground of the improper rejection of the defendant's evidence.

Jervis having replied, the Court took time to consider their judgment.

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Adv. vult.

The COURT now delivered judgment *seriatim*.

June 26.

RICHARDS, C. B. (having stated the case and the pleadings, and what occurred on the trial, and noticed the three principal objections raised and insisted on, proceeded thus) :

The first objection—that the plaintiff had not sufficiently proved himself to be an attorney, in order to enable him to maintain this action, or rather, perhaps, that he was proved not to be entitled to practise as an attorney—if well founded, must depend wholly on the construction of the Act of Parliament

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which has been referred to in support of it. There is no doubt that the plaintiff was once, and that long before the time of the publication of the alleged libel, an attorney, and qualified to practise within the terms and provisions of this statute. There is also no doubt that he did practise as an attorney during the period mentioned in the declaration, and up to and subsequent to the time of the publication complained of. Still the question which has been raised is, whether, although the plaintiff should be an attorney, and his name be continued on the rolls of the Court, he should not have been shewn to have qualified himself to practise as an attorney, within the restrictions imposed on practising attornies by this statute: *and that must depend entirely on the terms of the Act, and the application of its provisions to the case before us.

(His Lordship read the several sections of the statute, and pointed out the object of the Legislature therein.) All these provisions (continued his Lordship) relate entirely to the obtaining and entering the certificate required to be procured, to enable persons, who should be admitted attornies, to practise; but neither of them affects the continuance of the character of attorney with which persons having been once regularly admitted are thereby invested, or their right to practise at any time when they should do what the statute has required, to render themselves capable of acting as attorneys. They are required to take out certificates: and if they practise without, they are rendered liable to penalties. In one case, indeed (under the 30th sect.) their admission is declared null and void if they omit to take out a certificate for one whole year. Even in that case, however, there is only a suspension of their capacity to act, and it does not wholly destroy their character of attorney, it only imposes on them the necessity of being re-admitted, rendering them incapable of practising till that be done. Even the very imposition of a penalty for practising without a certificate, and indeed every provision of the Act, implies, and proceeds on the assumption, that the person required to take out a certificate, should be an attorney and be clothed with that character.

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In this case I am clearly of opinion that the character of attorney with which the plaintiff was invested by his admission

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before the grievances complained of in the declaration, existed throughout the period during which he is there alleged to have been an attorney—that he was so at the time of the publication of this libel, for which the action was brought—and that there is nothing in this statute which could in any sense operate to divest him of that character, in consequence of any omission or neglect on his part, in not complying with any of its provisions in respect of taking out and entering his certificate. I consider that the plaintiff is proved to have been, and that he was, as he states in his declaration, an attorney of the Court of King's Bench at the time of the grievances therein complained of, and consequently I think that there is no ground for entering a nonsuit upon that point.

As to the other objections which have been made on the ground of there not having been sufficient proof of the other collateral averments in the declaration, I may dispose of them at once, by saying that I can not see anything in them that requires observation; for the subject matter of them was wholly immaterial.

Upon the other objection to the verdict, which is now made the ground of an application for a new trial—that evidence of the plaintiff's general bad character was refused to be received at the *trial—I have still a very decided opinion. I am fully aware of the decisions upon that point to which we have been referred in argument. I cannot, however, hold them to be declaratory of the law of England, in establishing any such doctrine upon the subject of evidence, and I sincerely hope they never will. I shall certainly not extend them by any authority of mine. I cannot assent to a doctrine which would go to permit persons to be guilty of slander, under pretence of mitigating damages, on the plea of the general issue; and to allow defendants to impeach all the transactions of a man's life who may have occasion to seek redress in courts of justice, and throw on him the difficulty of shewing an uniform propriety of conduct during all his existence. It would be impossible for any man to come prepared to meet such a charge. Witnesses may be brought to answer the immediate purpose of the day, and to prove an answer to particular allegations; but is a plaintiff on such an occasion as this to

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come to the trial of his cause surrounded by a host of friends and acquaintances, consisting of all persons who may ever happen to have known any thing of him, and to bring them from Staffordshire for such a purpose, and in a case where no such issue was taken? Such a notion is quite absurd and inconsistent with all the principles of English law.

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There being several pleas by way of justification on the record, I suffered witnesses to be examined in support of specific allegations contained in some of them: and I now much lament that I did so. *I have been told by better judges on such points that I did wrong; for although the pleas were not demurred to, there is not one that can be supported in law. When, however, on the trial the question was put to Mr. Chetwynd who was called as a witness, respecting the general character of the plaintiff, I felt myself bound in duty to interpose to prevent it, although the counsel for the plaintiff did not object to it; because I considered it subversive of the integrity of the law to allow such a question to be asked.

Then it is said that, although such an examination may be inadmissible in support of the special pleas, it ought to be received in diminution of damages. The same answer, however, may be given to that argument, that a defendant can in no case be entitled to call on a plaintiff to vindicate the history of his whole life, because the defendant [? may] have pleaded a general denial of the charges alleged in an action for slander.

I am therefore of opinion that this rule must be discharged.

GRAHAM, B.:

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Upon the first question which has been made in this case, I shall only say that I think the LORD CHIEF BARON has very clearly and fully explained the ground upon which that rests: and I entirely concur in thinking that the Act of Parliament which has been adverted to, does not in any case deprive the person who has been once admitted an attorney, of his professional character *of attorney, but merely suspends it for a time. He still continues an attorney, and may at any time practise again on certain terms. By re-admission he is not made a new attorney, he is merely restored to his capacity to

act. I am therefore of opinion, that, even during the suspension of his right to practise as an attorney, he was still an attorney, although he could not legally act in conducting causes, but would be subject to penalties if he did ; and that therefore the plaintiff was entitled to maintain the present action, brought by him as an attorney, which I consider him to have been from first to last.

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I shall now proceed at once to the principal objection made to the verdict which the plaintiff has obtained, as raising a point of very great importance, and one which it is time should be determined one way or the other, as it is always recurring upon every case of this sort. Upon this point I am happy to find my own opinion confirmed by that of the rest of the Court, which is, that such evidence is certainly not admissible, in any case, under any circumstances ; either in mitigation of damages upon the general issue, or in support of any allegation put upon the record by way of justification. With the highest respect for the great Judge whose authority introduced this doctrine in the first instance, I have never been able to reconcile my mind to it, and I believe it has not influenced the opinion, nor met the approbation of any of the Judges of the other Courts. I have certainly myself let in this sort of evidence at Nisi *Prius in deference to that authority in the case of a person whom it was proposed to prove a reputed thief, which was proved. Now, however, that I am called upon to give my opinion (in which I am glad to find myself supported by my LORD CHIEF BARON and my brothers) upon this point, in a solemn manner, I am bound to state that I think that this sort of evidence is most clearly not admissible in any case. In the case of *The Earl of Leicester v. Walter*, I, for one, must observe, at the same time, there is certainly some distinction from the present, considered with reference to the nature of the evidence offered there, and the charge and the averments stated in the pleadings, and the same subject-matters of consideration now before us in this case. In *Lord Leicester's* case the libel imputed a positive offence, and the declaration stated that, by reason of the publication of the libel, the plaintiff's neighbours had refused to associate with him as they were used to do. Now it happened in point of fact, that there

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was too little foundation in truth for that averment: and it might, when it caught the eye of the learned Judge, have influenced him in determining to let in the evidence to negative the allegation in mitigating the damages. The kind of evidence offered in this case (which is very distinct in its circumstances) is of a very different and more general nature, and if rendered admissible by a positive rule of evidence, would be most injurious in its consequences, as it would enable the slanderer to destroy the best reputation in the world. I think it impossible to make any sound distinction between direct calumny and spreading evil *reports, and it must not be overlooked that this sort of evidence is always offered at a time, and under circumstances when the party is utterly unprepared to disprove it. At the same time I do not think we can borrow much authority from the case of *Waithman v. Shackell*, where two distinct facts were singled out for proof, and they ought to have been put on the record. I do not consider, therefore, that the rejection of the evidence in that case by Chief Justice ABBOTT is quite applicable to the present question, or that it has much impugned the authority of the former Nisi Prius decisions.

On the present occasion there is a full concurrence of opinion amongst the whole Court, that such general evidence of bad character, whether offered on the general issue, or in proof of matter pleaded by way of justification, is not admissible; and that principally on the grounds that a party cannot be expected to be prepared to rebut it: and that if it were received, any man might fall a victim to a combination made to ruin his reputation and good name, even by means of the very action which he should bring to free himself from the effects of malicious slander. So far, therefore, from leaving to slandered persons the only means of reparation in their power—the fair trial of an action by a jury of their country—such a proceeding would be rendered not only wholly ineffectual, but far more mischievous in its effects than the original calumny itself.

Wood, B. :

I am clearly of opinion that there is no ground whatever for

the present motion *for a nonsuit, on the two points reserved : or for a new trial in this case.

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Two objections have been taken, and urged as reasons why the Court should direct a nonsuit to be entered; the CHIEF BARON having reserved those objections for the consideration of the Court. The first is, that the plaintiff was not proved to be an attorney at the time of the grievances charged. There can be no doubt, however, that he was an attorney at that time, for it was proved by the book of admissions produced by the proper officer. But then it was said, that he had not taken out and entered his certificate in due time, according to the provisions of the 37th of Geo. III. c. 90, and therefore could not maintain this action. If he had not complied with the regulations of that statute, that would not have the effect of taking away from him altogether his character of an attorney. The consequence of that omission would be, that he might be subject to a penalty, and that he could not bring an action for fees and disbursements; because, under those circumstances he would be disabled from so doing, by the provisions of that statute; but, still he is not to be subjected, in addition to such penalty and disability, to be aspersed and ruined in his character of an attorney.

As to the objection, of there having been no proof that three actions had been brought—how does that stand in point of fact? A writ was given in evidence, in which there were three defendants. That might be a proof of several actions having *been commenced, or of one. *Stat indifferenter* upon the face of the writ: but the objection is a very curious one in this case; for if we look at the defendant's own libel, we shall find that the very foundation of the charge made against the plaintiff, is that he brought three actions instead of one; and the defendant objects, that the plaintiff does not prove the statement in the defendant's own libel, as if it would be less a libel, because both the foundation and superstructure were false. But the fact was proved; for the Master's *allocatur*, and the three rules to plead, were sufficient evidence of there being three actions. There is also another answer to it. If the plaintiff had failed to establish that fact, it is an allegation which it was unnecessary to prove with respect to one count in this declaration, and that would

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have been sufficient to support the action. I am of opinion however, that it was fully proved.

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Then it was contended that there ought to be a new trial in this case ; because, as it is said, the evidence which the defendant offered to give, of the general bad character of the plaintiff, was rejected. It was said by *Mr. Brougham*, abandoning the special pleas by way of justification, that such evidence might be given under the general issue in mitigation of damages ; and *Mr. Bayly* says, that every man is presumed to come prepared to give evidence of general good character ; and therefore no difficulty would be imposed on a plaintiff in requiring him to do so in such a case. *Mr. Abraham* was still bolder, and asserted that such evidence *might be given, not only on the general issue, but also under the special pleas, because the plaintiff had stated in his declaration the usual averment, that he was a person of good name, fame, and credit, and that he was therefore bound to prove it. This is new doctrine to me. I have ever understood, that general good character is always presumed in law ; unless, by evidence of particular acts, fairly and specifically put in issue, that presumption is negatived. Some cases have been mentioned, wherein it should seem that such evidence has been received at *Nisi Prius*. I will not attempt to distinguish the present case from those. I strongly protest, however, against any such mischievous doctrine altogether : and deny that it has any legal foundation. It cannot be supported on any principle of law. I say, distinctly, that it is not warranted by the law of the land : and whatever cases may be cited to support such doctrine, I cannot assent to them. When I am told by the House of Lords (who, I presume, would take and act upon the opinions of the Judges) that such is the law, I will then (as I must) submit to consider it to be the law ; but certainly not till then.

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If, as contended for, you could call witnesses, upon the plea of not guilty, to contradict the general introductory words, upon pretence of mitigating damages—what would be the consequence ? We should have counsel getting up, and saying—“ The plaintiff has alleged (as in the present declaration) ‘ that he is a good, honest, just, and faithful subject of the realm.’ I propose to call twenty witnesses, *to prove that he is an immoral dissolute man

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—twenty more, to prove that he has committed acts of dishonesty—twenty more, to prove that he is not just in his dealings—and twenty more, to prove that he is not a faithful subject, by proving that he has been guilty of sedition, treasonable practices, and even high treason.” Did any one ever hear such stuff as this? It might do in a farce upon the stage, meant to excite laughter, but it surely cannot be tolerated in a court of justice.

On the point of pleading, the case of *J'Anson v. Stuart* in the King's Bench, (1 T. R. 748,†) furnishes sound doctrine, and the true distinction is there taken. In that case (which was an action for a libel, brought in the Court of Common Pleas), the libel consisted of general charges, which were set out in the declaration. The defendant pleaded a justification, in terms as general as the charge: and the plaintiff demurred specially, because no particular facts were shewn. The Court of Common Pleas overruled the demurrer. The plaintiff brought a writ of error in the King's Bench, and that Court reversed the judgment of the Common Pleas. (His Lordship stated the particulars of the case cited, with great minuteness, reading emphatically the following passages of the judgment, as delivered by ASHHURST, J.) “This plea is bad, on account of its generality. The substance of the libel is, that the plaintiff was a common swindler, and that he, in concert with others, defrauded divers persons. One part of the defendant's argument has been, that this plea is only as *general as the charge in the declaration. But it is to be observed that it is the charge of the defendant, and the plaintiff was bound to state it as it was made. And it does not follow, that the defendant ought to justify in so general a way. The defendant is *primâ facie* to be considered as a wrong doer. When he took upon himself generally to justify the charge of swindling, he must be prepared with the facts which constitute the charge, in order to enable him to maintain his plea. Then he ought to state those facts specifically, to give the plaintiff an opportunity of denying them; for the plaintiff cannot come to the trial prepared to justify his whole life. If the plaintiff had been a common swindler, the defendant ought to have indicted

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† 1 R. R. 392.

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him, but he has no right to libel him in this way." (His Lordship also stated much of the judgment pronounced by BULLER, J. to the same effect; observing that the following sentences required particular attention, as bearing immediately and strongly upon the case before the Court.) "The first question here is, whether the defendant is at liberty to charge the plaintiff with swindling, without shewing any instances of it. That is contrary to every rule of pleading, for wherever one person charges another with fraud, he must know the particular instances on which his charge is founded, and therefore ought to disclose them." Those are observations which might be made on these pleas, as might the following also. "Now, in the present case, if this plea were to be suffered, it would be to allow any person to libel another more on the records of the Court than he could do in a *public newspaper. If the plaintiff has been guilty of any act of swindling, the defendant must be taken to know them. He could not prove the justification, as he has pleaded it by general evidence; but he has no justification unless he can prove the special instances; and knowing them he ought to put them on the record, that the plaintiff might be prepared to answer them." In another part he speaks thus: "It is not true, as was contended, that the general character of the plaintiff is put in issue; for the evidence to support the defendant's plea must be special."

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We have therefore in that case (continued his Lordship) which was well considered, and solemnly determined upon a writ of error, an authority that such general pleas are not sufficient.†

Then it was said, that if the defendant had no right to plead a justification in such general and indefinite terms in bar of the action, he might still give evidence to the same effect, under the general issue in mitigation of damages;—in other words—although you cannot plead it to avoid damages being given against you, you may give it in evidence in order to diminish them. Now I take upon myself to deny all that. There exists no such distinction in law: and I hold that you can no more be permitted to give particular or general evidence of that nature in mitigation of damages, than to plead it in bar of the action; and

† Et vide *Morris v. Langdale*, 2 Bos. & P. 284.

for the same obvious reason, viz. that the plaintiff cannot come prepared to meet it. It would be to allow persons *to slander others more effectually and diffusely in courts of justice, under pretence of mitigating damages, for slander cast on them in other places.

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I will now make some further observations on the pleadings in this case : and first of the declaration. Gentlemen who draw declarations, ought in all cases to attend particularly to the evidence by which they are to support them, and to frame the several counts according to the nature of the particular case. They would not then introduce any unnecessary averments which serve no other purpose than to entangle the cause and perplex the Judge whose duty it may be to try it. This declaration might have been drawn in such a way, as to have required no other evidence to support the case at the trial, than the mere production and proof of the publication of the libel itself.

I have seen indictments and declarations drawn by the ablest pleaders, and particularly, amongst others, by Mr. Wallace, heretofore Attorney-General, who was as conversant in the principles of the common law, and as skilled in the science of pleading as any man : and he sanctioned the mode of pleading I shall mention. If this declaration had stated—that the defendant published a libel of and concerning the plaintiff, &c. imputing to the plaintiff certain practices, by him, in the libel supposed to have been committed by the plaintiff acting in his character of an attorney ; and of and concerning certain actions therein supposed to have been brought by him—it would have rendered no other *evidence necessary, than proof of the publication of the libel, which, on being produced to the jury, would have made out the plaintiff's case. At first glance it might be thought that the word “supposed” was too indefinite ; but, when we consider that it is not incumbent on the plaintiff to prove what the defendant makes the foundation of his libel ; but on the defendant, who is to justify it (if he can), it is sufficient to state what the defendant has alleged or supposed ; for it is not the less a libel if the supposition be false or not proved. Of late, Courts in order to get over these positive introductory averments, have held, and very properly, that the

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libel itself is proof of them, if it goes to the length of stating what is positively averred, or so far as it does go.

I am also of opinion that every one of the special pleas, by way of justification, which the defendant has pleaded, is bad : and I say that it was the duty of the plaintiff's counsel to have demurred to them. If they had been demurred to, I can have no doubt but the Court would have held them all to be bad ; in which case, the record would have gone down to trial on the general issue : and, if the declaration had been framed as I have suggested, the plaintiff would have had nothing to prove but the publication of the libel—the CHIEF BARON having properly rejected the general evidence tendered by the defendant's counsel.

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I know that some persons think that by demurring, the plaintiff would consequently admit the *truth of all the slanders contained in these bad pleas. That is quite an erroneous idea. The party demurring confesses nothing, but that which is well pleaded. To illustrate that—if the demurrer is to a declaration which is good in point of law, and the demurrer is overruled, the allegations in the declaration are admitted, and you have no occasion for further proof, but you go on without more to a writ of inquiry. If the demurrer is to a plea well pleaded, and the demurrer is disallowed, the plea stands as a bar, without further proof of the facts. It is quite absurd to suppose, that by demurring to a bad plea by way of justification, in an action of libel or slander, you confess the matters of the slander to be true. That is not the legal effect or operation of a demurrer. The demurrer is no more than saying that the plea is impertinent, and the law does not require you to give any answer to it.

With respect to other mischievous consequences also well worthy of consideration arising from this sort of pleading—I will observe, that the effect of it in the present instance has been, that by unnecessary averments in the declaration, and suffering these invalid pleas to remain on the record without demurring to them, this very cause, which would not under judicious pleadings have occupied two hours, lasted I am told the whole day.

I am for these reasons clearly of opinion that this rule must be discharged in all its parts, upon every point.

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GARROW, B. :

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It but very feebly expresses my sentiments on the result of the discussion of this case, to say that I very cordially concur in all that has been this day so ably said by my LORD CHIEF BARON and my brothers, in delivering the very sound and learned judgment which we have just had the benefit of hearing pronounced, by each of the members of the Court whom it is my misfortune to have to follow, in a few words which I think it necessary to add on so very important an occasion. The very luminous and elaborate judgment of my brother Wood in particular, I will take the liberty of saying has most usefully and forcibly illustrated the principles of a science in which he has long been eminently conversant: and has furnished a valuable admonition in respect of its practical doctrine to the rising generation of lawyers, founded on the best models, the simple structure of the pleadings of earlier times, as drawn with good sense and sound discretion, by plain matter-of-fact men, unencumbered with useless and perplexing allegations. Such doctrine must have the effect, if duly attended to and appreciated, of redeeming our records from the obloquy which has been for some time, perhaps too justly, cast upon them. In no period of the judicial life of my learned brother, has he ever given a judgment which will be read with more satisfaction and instruction.

Upon the first objection of moment which occurs, that the plaintiff was not entitled to be considered an attorney, I can only say, as has been already observed, that notwithstanding his non-compliance *with the provision of the Act of Parliament on which the objection is founded, he was nevertheless still an attorney: and that there is nothing in the statute which prevents him from suing a slanderer for damage sustained by him in his business of an attorney. I should, for one, require an express provision to that effect, to exclude him from thus seeking redress in such a case. The argument used in support of the objection really amounts to this, that the Legislature allows uncertificated attorneys to be libelled with impunity. There may be, and are

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many very respectable attorneys who do not every year take out and enroll their certificates; and even where attorneys practise illegally without certificates enrolled, the proceedings are not void because they are still attorneys, and as such are subject to penalties.

The objection founded on there having been no proof of three actions having been brought, has been well disposed of by my brother Wood. There is therefore clearly no ground for a non-suit, and thus we get rid of the first branch of the application.

We then come to what we must consider, after the authorities which we have been referred to in support of it, a question of much importance, raised by the objection on which the motion for a new trial has been founded.

[*281] For my own part, I never had but one opinion on that subject. That such evidence should be admitted *on the plea of the general issue in pretence of mitigating damages, seems to me to be really quite absurd. The very able reasoning of the Judges who delivered their opinions in the case of *J'Anson v. Stuart*, is quite conclusive on the point of the total inadmissibility of evidence of bad character, even in respect of a particular charge. In this case the evidence proposed, was general evidence of the plaintiff's bad character, in the practice of his profession and business of an attorney. Now if there could possibly be any class of men to whom good fame and fair character—which is beyond price to all men—be of more value than to others, it is so in an especial manner to men engaged in the practice of the profession of the law. They are undoubtedly sometimes called on to administer to the bad passions of mankind, and obloquy when cast on them finds a readier ear, because there are many amongst the public who are predisposed to entertain very much disaffection towards all who exercise the business of an attorney, and there certainly are, it must be admitted some amongst them, whose conduct does not tend much to discourage that feeling to their prejudice. The more therefore do such practitioners as deserve it, by conducting themselves with honor and integrity, require to be protected in their good name and fame. It would be no difficult matter I fear, for an angry man who libels an attorney, to find many persons who would be ready to come forward in support

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of his defence of general bad character to an action brought against him, and to swear that the plaintiff was a man of general bad character in *his profession, some of whom perhaps might conscientiously think so, from having heard rumours to his prejudice, from clients who might have been unjustly disappointed in the result of their litigation. Can it be right then, that such evidence should be held to be admissible against a man who is obliged either to sue, or suffer an unfounded calumny? I join most readily in the hope that that never will be considered to be the law of England. If ever it should, the libeller will become a much more general character than we find him now; for he will derive protection, and impunity from the apprehension and dread, with which the object of his malice would naturally be possessed, of resorting for redress to courts of justice, to vindicate his name, where it would be permitted to the defendant to bring forward testimony of general bad character, which from its nature it would be impossible to disprove; whereby they in effect become the means of putting the libels of which they complain on the records of the Courts, and giving a wider circulation to the calumnies contained in them, with the additional matter made the ground work of a defence. It ought to be allowed to all well conducted men, to come to courts of justice to clear their character from aspersions, without fear or dread, as a place to which they may safely and therefore cheerfully resort to re-establish their reputation.

Rule discharged.

After judgment had been delivered in this case, Wood, B. who had much impressed *the rest of the Court by the zealous and able manner in which he had given his opinion, and the learning which he had displayed in his reasoning on the several points which were made, had the honour to be gratified by the tribute of a singular compliment paid to him by the Court.

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The LORD CHIEF BARON, on the conclusion of Mr. Baron GARROW's judgment, rose from his seat, and, addressing Mr. Baron Wood, publicly congratulated the venerable Judge †on the unimpaired vigour of intellect, and unabated learning, which he had

† [Then æt. 82. He resigned early in the following year (1823)].

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evinced this day in the discharge of his high duties. His Lordship then expressed the thanks of himself and his brothers to the learned Baron, for the very effective and decisive part that he had taken in the determination of the important questions raised by the objections which had been the subject-matter of the argument on this rule.

EXCH. MICHAELMAS TERM.

1822.
Nov. 16.

PIPPIN AND WIFE v. SHEPPARD.†

DEMURRER.

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(11 Price, 400—410.)

It is not a ground of demurrer to a declaration in an action on the case by a man and his wife against a surgeon for an injury to the wife by reason of the defendant's improper and unskilful treatment, that it is not stated, in the averment that the defendant was retained and employed as surgeon for reward to be to him paid, by whom he was so retained, or by whom he was to be paid.

Nor that it is not stated that the defendant undertook, &c. properly or skilfully to conduct himself in and about, &c.

It is sufficient to aver that the defendant was retained as a surgeon and entered upon the cure.

THIS declaration (which was without venue) stated that the defendant before, and at the time of committing of the grievances, &c. followed and carried on the art, mystery, and occupation of a surgeon—that defendant, afterwards, &c. at Bristol aforesaid, was retained and employed as such surgeon for a certain reasonable reward to be to him therefore paid, to treat, attend to, and cure divers grievous hurts, cuts, &c. just before then by the wife had and received: and the said defendant then and there entered upon the treatment and cure of her; yet defendant afterwards, to wit, on the day and year aforesaid, &c. and other days between *that day and the day of exhibiting this bill at Bristol aforesaid, so carelessly, negligently, improperly and unskilfully,

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† Followed, in effect, in *Gladwell v. Steggall* (1839) 5 Bing. N. C. 733.—R. C.

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conducted himself in that behalf, and then and there so carelessly, &c. applied his care and treatment in and upon a certain wound, &c. of the said wife, that by means thereof the said wound became and was grievously aggravated and made worse, and was thereby then and there made and rendered violently and dreadfully inflamed, &c. to the danger of the wife, and that her life was greatly despaired of, and that by means thereof she suffered great pain, &c. and was forced to submit to painful surgical operations in and about the treatment of the said wound by other and more skilful surgeons, who were thereupon necessarily retained to attend upon her, to wit at Bristol aforesaid.

The defendant demurred specially for the following causes:—for that it is not stated or alleged in or by the said declaration, nor does it appear therefrom by whom the defendant was retained and employed as such surgeon as therein mentioned, to treat, attend to, or cure the hurts, &c., or that the plaintiffs or either of them retained, &c., or that defendant was so retained at their or either of their special instance or request: and also for that it is not alleged or stated in or by the said declaration that it was the duty of the defendant or that he undertook or engaged properly or skilfully to conduct himself in and about the treatment or cure of the said hurts, &c. nor by whom the said reasonable reward in the said declaration mentioned was *to be paid to the said defendant. And also, for that the said plaintiffs have not alleged or stated in or by the said declaration any sufficient ground or cause of action against the defendant; and also, for that no place of venue is stated where the said defendant is supposed to have so negligently, improperly and unskilfully conducted himself; and also, for that the said declaration is in other respects uncertain, defective, and informal, &c. The plaintiffs joined in demurrer, and it was now supported by

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Bayly, who (giving up the objection to the want of venue) contended that the declaration, though in form complaining of a tort, being in substance framed and founded on a contract, was objectionable in not setting out the terms of the contract, and in that respect the principal ground of this demurrer was the not stating by whom the defendant had been retained and employed

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to conduct the cure, which was the subject-matter of the contract.

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The object of the rule of pleading, requiring the terms of a contract to be set out, is, that the defendant may know the nature and extent of the demand, and be enabled to make an effectual defence, which, unless he be apprized of the precise charge, he cannot do. It was strongly urged that this declaration, being framed in tort, did not therefore preclude the defendant from taking advantage of any defects in it, which would have been ground of objection to it, if it had been in *form assumpsit, or founded on contract: *Buddle v. Willson*,† *Powell v. Layton*.‡

Another mischief arising from permitting such loose pleading (it was submitted) would be that the defendant, after a recovery against him in an action on such a declaration might still be sued upon a liability to other persons; as, for instance, if one having an annuity depending on the life of this person, on whose recovery he would, therefore, have an interest, and had employed and sent the surgeon to attend her, he also might have an action against him for unskilful treatment, whereby her death had been occasioned or accelerated. If this declaration should be held good, it would become a precedent and the common form, whereas there is no such form to be found in pleading, and would be highly injurious to defendants to be subjected to such a mode of declaring, for which there was as yet no precedent or authority.

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Carter, contra, insisted that the declaration was sufficient, and that there was no ground for the demurrer. So far from this declaration being without precedent or authority, it would be found to be more full in its statements than the old law required. In the Reg. Brev. 110 there is an old writ (which was always as full as the declaration), the form of which shews that it is unnecessary to mention in the declaration more than enough to *shew that the plaintiff had sustained an injury by the misconduct of the defendant.

+ 3 R. R. 202 (6 T. R. 369).

† 2 R. R. 660 (2 Bos. & P. (N. R.))

R. R. 556 (3 Brod. & Bing. 54;
9 Price, 408).

365). See *Bretherton v. Wood*, 23

In the case of *Coggs v. Bernard*,† principles of pleading are recognized on which this declaration may be supported. An undertaking to do a thing, even without consideration, creates a liability for negligence and want of due care. The undertaking there spoken of, also, means, not only an assumpsit, or a future promise, but any actual entry upon the thing, by the party, and taking upon himself the trust, as Lord Holt says, in that case, and he adds, “If a man will do that, and miscarries in the performance of the trust, an action will lie against him for that, though nobody could have compelled him to do the thing”; and he puts the case of the carpenter undertaking to build a house by a given time, where, although he should not do so, an action would not lie, yet for building it unskilfully it would.

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In the same case, the form of the declaration is adverted to by POWELL, J. who relies on the form of the writs in the register which have been cited. He says the authorities of the pipe of wine, and the cure of the horse, are in point, and there can be no answer given them but that they are writs which are framed short. But (he observes) a writ upon the case must mention every thing that is material in the case, and nothing is to be added to it in the count but the time, and such other circumstances.

The action, in the present instance, is not brought nor founded on the contract, but on the damage done to the individual by the negligence, improper treatment and unskilfulness of the defendant, who had undertaken, or (as Lord Holt translates the word “assumpsit,” and as the expression is in this declaration) had entered upon the cure, without any allusion to any contract between any parties. The plaintiffs seek damages for the injury done to, and the suffering endured by the wife, to which they, and they only, will be entitled, if they prove their declaration without reference to any other person who may have retained and employed the surgeon, and who, whatever right such person might have to sue on the contract, have also a right to proceed at law for the special damage, which is wholly distinct from, and independent of any existing contract, and is founded on a different cause of action. And that is the answer to the supposed

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† 2 Lord Raym. 909.

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cases which have been put of third persons having also a possible right to sue the defendant on the contract. The right to sue for damages for personal grievance is personal.

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In respect of persons in general, who profess skill in particular matters, and perhaps in the case of surgeons especially, there is a duty cast on them by the law to treat the objects of their art properly, and with, at least, an ordinary degree of skilfulness, at whosoever instance they may be employed, and by whomever they are to be remunerated. *In *Seare v. Prentice*† it was held that an action on the case lies against a surgeon for ignorance and want of skill, as well as for negligence and carelessness. He therefore submitted that the declaration was sufficient.

Bayly, in reply, contended that the word “assumpsit” used in the writs cited from the register, and the words “took upon himself” in the declaration, in *Coggs v. Barnard*,‡ necessarily imported an undertaking to and a contract with somebody, and that must be taken to be with the plaintiff, shewing, therefore, by whom the defendant was employed, which distinguished those cases from this, where the declaration merely stated that the defendant entered upon the cure without stating with whom he contracted for that purpose, sufficient information having been furnished in that respect in the cases cited. Such actions in case, founded on contract, have been permitted to be turned into torts in the form of the declaration, for the sake of convenience, although the propriety of it has, in many cases, been doubted, yet that has never been considered as dispensing with the necessity of shewing the material terms of the contract, which is the basis of the action.

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All that was determined in *Coggs v. Barnard*‡ was, that an action would lie on an undertaking to do a thing if it were ill-done, although there were *no consideration or reward stipulated for: but that case does not determine that an action would lie if there had been no undertaking; or that, in declaring for an injury sustained in consequence of a misfeasance, it is unnecessary to aver in the declaration in an action for damages for doing it ill, at least a general undertaking to do the thing.

† 8 East, 348, 352.

‡ 2 Ld. Raym. 909.

The single question is, whether this declaration, which is for a tort in form, but founded, in substance, on a contract, can be considered sufficient, when it does not state any one of the terms of the contract, which is the gist of the plaintiff's cause of action.

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RICHARDS, C. B. :

I am really at a loss to know how any declaration should be framed in this case so as to be right, if this be wrong. The defendant, being a surgeon, undertakes to the public, to cure wounds and other ailments of the human system, and professes himself ready to be employed by any one for that purpose. The declaration states that he was as a surgeon employed for a reasonable reward, to attend and cure this patient, that he entered on the treatment, &c. (stating the declaration). It is, therefore, I think, sufficiently stated that the defendant undertook the cure. Then negligence and improper treatment are charged, and the injurious effects of such misconduct are averred. The question then is, to whom was the injury done? If a stranger had sent the defendant as a surgeon to cure this woman, undertaking to pay him for his attendance, *he would not be entitled to recover or sue for damage and injury done to her, in consequence of the surgeon's negligence and want of skill. From the necessity of the thing, the only person who can properly sustain an action for damages, for an injury done to the person of the patient, is the patient himself, for damages could not be given on that account to any other person, although the surgeon may have been retained and employed by him to undertake the cure. The party employing the surgeon can have nothing to do with this action: I am, therefore, of opinion that the demurrer cannot be sustained, and that there must be judgment for the plaintiff.

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GRAHAM, B. :

There can be no difficulty in a case of this sort to understand to what this declaration really applies. The objection must necessarily be founded on the declaration being in its present shape equivocal. I am clearly of opinion that it is not. It is clear that it means nothing more than to charge that damage has accrued to the plaintiff's wife, from the injury sustained by the

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misconduct of the defendant, in taking on himself the cure of her. The plaintiffs are the only persons who could recover damages, or be entitled to demand them, for the injury complained of. That is the true test by which this question must be tried. The case of *Coggs v. Barnard* goes to shew that, in the case of a contract to deliver goods safely, it is sufficient to state that the party undertook to do so, and did not. In this

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case it appears to me that there is a sufficient allegation *that the defendant undertook the cure, and that by his unskilful conduct the plaintiff's wife suffered an injury, and that is enough to support the action. Whatever cause of action other persons besides may happen to have, is therefore wholly out of the question.

[Wood, B. was absent.]

GARROW, B. :

It would be of most mischievous consequence if this declaration could not be sustained. In the practice of surgery particularly, the public are exposed to great risks from the number of ignorant persons professing a knowledge of the art, without the least pretensions to the necessary qualifications, and they often inflict very serious injury on those who are so unfortunate as to fall into their hands. To hold the contrary, would be to leave such persons in a remedyless state. In cases of the most brutal inattention and neglect, patients would be precluded frequently from seeking damages by course of law, if it were necessary, to enable them to recover, that there should have been a previous retainer, on their part, of the person professing to be able to cure them. In all cases of surgeons retained by any of the public establishments, it would happen that the patient would be without redress, for it could hardly be expected that the governors of an infirmary should bring an action against the surgeon employed by them to attend the child of poor parents who may have suffered from his negligence and inattention ; and are they to be

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*without remedy because they cannot get the names of the 500 persons by whom the surgeon was employed, to insert in their declaration? If we were to hold that such an averment were

necessary, it would be holding out an encouragement to neglect and carelessness, by depriving parties of all remedy, in consequence of making it impossible that a declaration should be so framed as to be free from the objections raised by this demurrer.

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Per CURIAM :

There must be

Judgment for the plaintiff.

Bayly asked permission to be allowed to withdraw the demurrer and plead the general issue, but the COURT refused it, saying that it could not in any case be granted after argument.

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J. MOSS.

(11 Price, 455—473.)

1822.
Nov. 27.

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Possession of a steward of documents, as leases, &c. held to be the possession of his employer, and therefore not affected by a *subpœna duces tecum* served on the steward to produce them on the part of a defendant on the trial of an action at law, in which his employer was plaintiff.

The steward may, however, be examined as a witness to give evidence of the existence and contents of a particular document, if due notice have been given to produce it specifically.

A steward is not, like the legal adviser of a party, a privileged person protected by his relative situation from disclosure (to a certain extent, at least, as where the employer would be compellable himself to discover the matter by answer to a bill in equity) of his knowledge of his employer's affairs, and the existence and contents of muniments, on the ground of the necessary confidence unavoidably reposed in him, and the immediate communication between them, as analogous with the relative situation and intercourse of attorney and client.

THE pleadings in this case were as follows :

The declaration (in covenant for not repairing, &c.) stated, that George E. Viscount Falmouth was seised in fee, and on the 26th day of October, 1803, *by indenture demised to Joseph Moss to hold from 29th September, 1805, for fourteen years. Covenant to repair, &c. It then averred the death of lessor, and descent to plaintiff as his son and heir.

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The pleas were, 1st, that the lessor was seised only for life, and at his death the demise determined; 2nd, *Non est factum*; 3rd, traversing the descent; 4th, that J. Moss and defendant had repaired; 5th, that they did not suffer the premises to be ruinous.

Replication that the lessor was seised in fee taking issue on the other pleas.

The cause was tried at the last Assizes for Cornwall, before Richardson, J.

The plaintiff having proved a *prima facie* case of seisin in fee in George Lord Falmouth, the lessor; the defendant endeavoured to prove a seisin in Hugh Lord Falmouth, the uncle of the plaintiff. For that purpose the defendant first called several witnesses to prove acknowledgments by an old tenant during his tenancy, that he held the farm (called Tolverne, the premises in question) of Hugh Lord Falmouth, but the learned Judge having been of opinion that that part of the evidence failed, the defendant then called back the plaintiff's steward for that purpose. That witness had been served with a *subpœna duces tecum* by the defendant, to produce leases, &c., but the Judge thought that the witness's possession of such documents, in his capacity of steward, was the possession of his employer, *the plaintiff, and therefore not affected by the *subpœna duces tecum*.

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The defendant then, having proved a notice served on the plaintiff to produce leases, &c., and particularly the lease from Hugh Lord Falmouth to such tenant, proceeded to examine this witness as to the contents of the lease so specified in the notice.

That examination was objected to, on the ground that he was not bound to disclose matters affecting his employer's title which had come to his knowledge confidentially, as the steward and agent of his employer.

To that objection it was answered, that the privilege was confined to the professional confidence reposed in an attorney or barrister; whereas this witness was neither. The learned Judge thereupon received the evidence, reserving the objection.

The jury found, by their verdict, that the late Lord George was tenant for life at the time of granting the lease.

2nd. For the plaintiff, on the issue of the repairs. Damages, 50*l*.

Pell, Serjt. moved this Term for a rule to shew cause why there should not be a new trial, on the ground of objection raised at *Nisi Prius* as to the privileged testimony of the witness which *had been then insisted on; and he informed the Court that it was with the permission of the learned Judge who tried the cause that this application was made, he himself being desirous that the point should be determined on argument, if the Court should think the question a fit subject-matter for discussion.

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A rule having been granted, *GARROW*, B. now read the report of the evidence; the material part of which consisted of the foregoing statement of what passed at the trial: to which it will be sufficient to add, that the plaintiff's steward produced a lease dated 26th October, 1808, between George Viscount Falmouth and Joseph Moss; whereby Viscount Falmouth demised to Moss the farm of Tolverne (the premises in question), Habendum from September, 1805, for fourteen years. Covenant to repair premises and fences, and yield up so repaired. Lessor died in 1808. ' The present Lord Falmouth was his eldest son. Joseph Moss died in 1815. The witness had received rent since the late lord's death from Joseph Moss, and since his death from a tenant in possession, on the part of the defendant. The house was proved to be very much out of repair, and the witness had asked 300*l.* for repairs in 1819, and 150*l.* in 1820.

On behalf of the defendant, after a notice to produce all leases and counterparts granted by Hugh Lord Falmouth to John Cornish had been read, the examination of the witness *Curgenven* (the steward to the plaintiff) was stated. In that *part which that had been objected to, for the sake of unequivocal accuracy, his Lordship reported the principal questions put, and the answers which followed. Having stated that he was a conveyancer, but not an attorney, the examination thus proceeded. To the following question, "Have you any lease granted by Hugh Lord Falmouth to John Cornish?" the witness's answer was, "I have the fragment of a lease." To the questions which were afterwards put to him, his answers were, "I have that here—it is the fragment of a lease granted

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by Hugh Lord Falmouth to John Cornish, of the farm of Tolverne, in the parish of Tilleigh. I saw it about a week since. It was executed by Lord Falmouth. It is signed 'Falmouth.' By Hugh Lord Viscount Falmouth. I do not know whether it contains any demise. I do not know whether there is any demising part. It is on paper. I have about half of it, torn in different parts. I have part of the beginning and part of the end. It is a lease by Hugh Lord Falmouth to John Cornish of the farm of Tolverne. There is no seal to it."

On his cross-examination he said, "I knew Hugh Lord Falmouth when I was eight years old. I was not his steward. I had nothing to do with this property. I only saw him once or twice. I never saw him write. I have a recollection that it was a lease of Tolverne."

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Being re-examined, he said, "Hugh Lord Falmouth *died in 1782. I know the present and last Lords Falmouth, and their handwriting. The word 'Falmouth' is not their handwriting. I think there is no seal."

The rest of the evidence reported went to the question of the title of the plaintiff's ancestor and to the repairs.

His Lordship, in concluding his report, observed—after having stated the objection to the evidence resting on the obligation which the admissibility of such evidence would impose on a steward of disclosing his employer's title—that he had very unwillingly received the evidence, but reserved the objection.

Adam now shewed cause :

He contended, that on principle there was nothing in the relation of master and steward which could protect the knowledge possessed by the latter of the affairs and business of the former from disclosure in a court of justice, on the ground of confidence, or it might be extended to all the servants in the employ of any party. He urged that the rule of evidence, in that respect, as founded on the authorities, was confined exclusively to the case of confidential communications necessarily entrusted to the legal adviser of the party, and that the protection or privilege was in all the cases expressly stated to be restricted to barristers, solicitors, and attornies acting

confidentially and professionally for *their clients; and he cited *Vaillant v. Dodemead*† and *Wilson v. Rastall*‡ (and the cases there cited), where the Courts have laid it down that the privilege is not to be extended by Judges, however much, as men, they may lament the restriction.

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(RICHARDS, C. B. : There is no doubt that if a bill in equity had been filed in this Court or the Court of Chancery, for the purpose of obtaining a discovery of this very document, that the Court would have entertained it, and have compelled the production of it, if it could have been shewn to be such a document as would assist the defendant in proving the defence set up to this action.)

Pell, Serjt. and *Wilde*, in support of the rule, contended that the policy and principle of the rule of law respecting privileged communications, applied as strongly to the case of master and steward as to that of attorney and client; and adverted to the impression (as reported) on the mind of the learned Judge who tried the cause, as an authority so far. They urged, that this case was, in respect of the nature of the connection between the parties, very analogous with that of attorney and client—that it raised an entirely new question on the already established principle regarding its application and extent, and one which was *res nova*, and had not been at all approached *by any of the authorities, except in as far as they went to establish, by the analogy already mentioned, the proposition now contended for by the plaintiff, that the witness was privileged from examination by reason of his confidential employment and relative situation in the plaintiff's service. They distinguished the cases of private communications to personal friends, and secrets entrusted to medical attendants and advisers, with respect to whom the confidence was in each case merely collateral, and quite beside the reason and spirit of the principle of the rule of law, from the necessary confidence in respect of the subject-matter unavoidably reposed in the steward of a man of large property, which was immediate and direct, as in the case of attorney and client, and in respect of which nothing could be

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† 2 Atk. 524.

‡ 2 R. R. 515 (4 T. R. 753).

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predicated of the one which would not be alike applicable to the other; that it was for that reason nothing like the case of master and any other servant: that was the vice of the argument; for that relation approached nearer the unprotected and unprivileged communications between friend and friend, physician and patient, and served at once to illustrate the distinction now taken.

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They pressed the mischief which a contrary principle would introduce in the administration of the law, and the insecurity of title and property, which would be the necessary consequence of holding that a steward was compellable to disclose his knowledge of his master's affairs on oath in a court of justice. They suggested, that to hold *otherwise would be to enable any person to get at the latent defects in a title to real property by the aid of a fictitious and fishing action of ejectment, or of covenant, brought for the purpose of ransacking, through the medium of a steward, by means of his testimony extracted by a *subpœna duces tecum*, the contents of the muniment-room of any person of great landed property.

They finally submitted that the principle on which the witness was not compellable to produce the document itself, was applicable equally to the question of obliging him to give evidence of its contents. From the natural imperfection of human memory, it would be better that he should be at once ordered to produce it. Still more objectionable was it that he should be compellable to state the effect of such a document, which might be a mere question of law. For these reasons, as well as on the principle of law respecting privileged communications, they insisted that the evidence of the witness ought not to have been received.

(The LORD CHIEF BARON left the Court, towards the conclusion of the argument of the counsel who were heard in support of the rule, to try the *Nisi Prius* records in the Exchequer Chamber, but he had intimated a very strong and decisive opinion in the course of the argument, and on retiring.)

GRAHAM, B.:

I cannot bring myself to entertain any doubt upon this

question in the shape in which it is now brought before us. The LORD CHIEF BARON was of the same opinion as myself, *and I have his authority for saying so, which I regard as a considerable sanction of my own. In order to judge of this question we must look to the real circumstances of the case on which it arises. This is not a case of a tenant disputing his landlord's title, but it is a defence (to an action brought on a covenant in a deed) by the party claiming under a representative, or, I should rather say, a derivative title, which defence is thus intended to be sustained. In effect the defendant says, you, the plaintiff, are a stranger; I, the defendant, hold under a lease from a former Lord Falmouth, who being only tenant for life, his acts do not bind the remainderman.

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Let us suppose that in this case the party had proceeded in another way. I entirely concur with my LORD CHIEF BARON in this, that the occupier of this property, not being in the situation of a tenant to the plaintiff—and therefore not a tenant disputing the title of his landlord, the person under whom he holds, but he insists that the plaintiff is a mere stranger, and that he (the defendant) derives his right not from the plaintiff but from another person, thus altogether disclaiming all privity—might, without doubt, have filed a bill in equity, stating that the plaintiff had in his muniment-room documents which, if produced, would shew that the plaintiff's ancestor could not bind him by his acts. The only effectual answer that could be given to such a bill, which would avail to protect him from making discovery, would be, that he had no such document; for if he had, there is no doubt that a court of equity would have compelled the production *of it, on the equitable principle that it would be against conscience to permit him to suppress it.

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The case at present stands thus: the defendant in this action of covenant served the witness with a *subpœna duces tecum*, or rather a notice to produce certain documents, from which it is said it will appear that the plaintiff has no claim against the defendant. Lord Falmouth may certainly rest on his oars and say, "I will not produce any deeds which I have in my possession." He is entitled to say so: but then the consequence of his remaining passive would be, that the defendant then becomes

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entitled to call any one who may have seen such documents, and can prove that fact from their contents, and may examine him for that purpose. If the notice had been general and vague, and not confined to any specific deeds, it might not have been effectual perhaps; but in this case the notice is framed to meet the defendant's case, and particularly mentions the deeds intended to be relied on, and which were to be found in Lord Falmouth's chest.

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I should be one of the last to decide rashly, I hope, a question of the importance which this was represented to be when put, as if it had involved the proposition that a steward would be bound to answer all questions asked of him respecting the title deeds of his employer. But this involves no such question. He is merely asked whether there is not a certain deed in Lord Falmouth's possession *which would shew that the title of his employer will not support the claim set up against the defendant. That is a question which Lord Falmouth himself might be asked, by having recourse to the proper mode; and surely the steward cannot have any protection from the privilege of confidence in such a case where his employer himself could not withhold the information required. It is a mistake to say that here he has been interrogated as to the general contents of Lord Falmouth's chest of deeds; but simply and properly whether a predecessor of Lord Falmouth did not in his lifetime grant this lease; and whether, under certain deeds in Lord Falmouth's possession, that ancestor was not only tenant for life: and to that I cannot see any solid objection.

We are not therefore called upon to say whether a steward who should be asked general questions respecting his employer's title and the deeds in his possession, to which the steward must necessarily have access, would be protected from answering, lest he should injure his employer's interests. This is a matter which might have been asked of a stranger, or even of the attorney who prepared the draft, for he would be competent to be asked as to such a fact.

In this case I am clearly of opinion that the evidence was properly received; and when my brother RICHARDSON says he admitted it with reluctance, that may be well so when the nature

of the defence in support of which it was used be considered. *But he did admit it, and I think he was right in so doing. It was for the jury to say what was the effect of it. The lease has no signature by any remainderman, or any one under whom the plaintiff claims. Whatever might have been the effect of it, I am well satisfied that it was very properly admitted.

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Wood, B. :

I entirely concur with my brother GRAHAM and the LORD CHIEF BARON, who also intimated to us the same opinion before he left the Court to sit at Nisi Prius, having previously heard the substance of all the argument which has been offered to the Court.

In this action the plaintiff, who is a remainderman in fee, declared in covenant, on an indenture of demise, made by his ancestor for a term of years, and he therein assigns breaches committed in his own time. The defendant has pleaded, as he had a right to do, undoubtedly, that his lessor was only tenant for life, and that therefore (he being dead) the lease was determined before the supposed breaches are alleged to have been committed. That is clearly a good plea : and upon that issue is joined. It has been said that a tenant is not to be permitted to scrutinize the title of his landlord, by means of examining witnesses in his landlord's confidence, as has been done in this case ; but this is not an action by a landlord against his tenant, under a lease, in which case the defendant could not plead *nil habuit in tenementis*. But where he has pleaded to an action of covenant such a plea as this, which *makes an inquiry into the plaintiff's title necessary to his defence, he surely may examine as to that plea, or where, as in this case, he raises the very question which is asked by the plea which he has put upon the record. If the plea were not proper, it ought to have been demurred to, but being here on the record, he may and must necessarily support it by the best evidence that he can procure.

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Then the question arises on the evidence which he has examined in support of this plea. It is admitted, in argument, that the rule respecting privileged matters of confidence, does not extend beyond the case of attornies and barristers employed professionally. In this instance the witness is simply a steward,

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and it is clear, therefore, that he can claim no privilege on the ground of being within the rule as at present established, in respect of his being employed in either of those characters.

It happened in this case that Lord Falmouth had in his possession certain instruments which concerned the defendant, and which, if he had the means of producing them, would make out his defence, and which, therefore, the plaintiff might have been compelled to discover on oath. Having had notice to produce them, if he do not do so, then, undoubtedly, the defendant would be permitted to give parol evidence of the contents of those instruments, for no doubt it is competent to him to do so, if he have given a notice to the party in whose possession they are, in terms sufficiently precise to point out what the instruments are *which he requires to be produced. If they are not produced, such notice having been given, lets in the party, claiming the advantage of them, to give parol evidence that such instruments are in existence. For greater caution, in the present notice, there is added a *duces tecum*. There is no doubt, therefore, that if they had not been produced, the defendant might have examined the party having notice as to their contents. But, in fact, the instruments were produced, and that was certainly the best evidence which could be given. There was, therefore, no occasion to supply them by parol evidence of what they could have shewn.

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I see no sort of objection to the evidence which has been received on this trial of this issue. It stands on the footing of this plain rule, that where evidence making for one party is in possession of the other who has notice to produce it, if it be not produced, parol evidence may then be given. I deny that this was a case where the witness could not have been examined as to the contents of the instrument if he had thought proper not to have produced it. I am therefore of opinion that the evidence was rightly received.

GARROW, B. :

This case was said to be likely to present for our consideration a question of considerable importance and novelty, and so perhaps it would have done had it been brought before us as

we were led to expect; but as it is now put we may determine it on the authorities before us, and *on the broad principle on which the cases have been decided. In determining this case, as we are about to do, we abridge no privilege already existing, and we leave the general question untouched. All we have to do in this case, is not to extend the privilege of protection. The cases confine it to the instances of counsel, attornies and solicitors, who have hitherto been held to be excepted, in respect of this privilege, from all the rest of mankind, and that, although the reason of it proceeds on the wisest possible grounds, because life, liberty and honour, being at once put to hazard, requires a general disclosure on the part of the client individual of all that belongs to their situation, in order to possess their advisers of the means of rendering them effectual assistance. The client is called upon to make his professional adviser, as it were, himself; and therefore such persons ought to be, and have been, held to be protected from answering questions which may tend to disturb the sacred trust reposed in them. Still, beyond those excepted persons the privilege has never been yet extended. Cases of the most deplorable hardship may arise, and very often do, and that argument has been much pressed. What can be a stronger appeal to the feelings on this question than the sensibly delicate situation in which men of the medical profession are so frequently placed, to whom communications of the most anxious kind must often be made, admitting of not a moment's delay, and frequently by the other sex, having the strongest claims on their confidence and fidelity: and yet, we have seen that, on authority, *they are liable to be called on to disclose with bleeding hearts, the painful secrets which have been necessarily entrusted to them, and under the most distressing circumstances; but sacred as those communications must ever be held, the ends of truth and justice have been hitherto deemed paramount. Although I would not restrict the privilege, even in the shadow of a degree, wherever it shall be found to exist, the authorities are so very strong against all the attempts which have been made to extend it, that it would now necessarily require a very strong case, and much stronger than this to which our attention has been called by the present discussion. It is very much against

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the arguments which have been urged in favour of the privilege being possessed by persons in the situation of this witness, to know that, by the constant practice of courts of equity, such disclosures may be compulsorily obtained, even from the party himself, on whose account it is that the privilege, if any there be, of the class of persons to which the witness, now claiming it, belongs, by proceedings, with which, since I have sat in this court, I have become more habitually acquainted. The defendant might have compelled the plaintiff, by resorting to a court of equity, to have produced the deed which was the subject-matter of the examination of this witness, on the ground of its relating to the title of the defendant ; who therefore had such an interest in it as would procure to him the interference of a court of equity to compel the production of it. In this case the witness was asked on the trial, if he had *such an instrument ; he admitted he had ; and if he had refused to produce it, it would have been a mockery if he could not have been examined as to its contents. Any stranger might certainly have been examined on the same subject, and for the same purpose, if they had happened to have seen and read it ; and I cannot, under the circumstances, consider that his being the steward of the owner of the estate, afforded him any protection from the examination. An arbitrator, on a reference before whom it had been produced, and who had taken a note of it, might have given evidence of it, if, after the notice, it had not been produced. An amanuensis, who might have been employed to transcribe it any time, or a private friend, to whom it might have been communicated in confidence, whilst partaking the hospitalities of his Lordship's table, that he had in his possession a deed which shewed that his uncle had only a life estate in the premises. All these persons might have been called to give evidence of its existence and contents. These instances are all confidences, more or less, and are only not protected because the parties do not come within the rule, being neither barrister, attorney nor solicitor ; and the witness in this case, the steward of the party, is in no better situation than any of the persons I have enumerated, and all would be obliged to answer the questions put respecting the facts of their knowledge, and such evidence would no doubt justify the jury in finding as they

have done. It is admitted that a person, in the situation of this witness would be compellable to give evidence of *a parol communication, admitting the same fact; and why not, therefore, the contents of a document, to which, for greater certainty, he may, if he chooses, refer, to correct himself, if he should misstate it, when speaking of conversations in respect of which his memory may be less accurate.

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MOSS.
[*473]

His Lordship concluded (after noticing the small amount of the damages) by adopting the words of Lord KENYON, in *Wilson v. Rastall* :—"I have always understood that the privilege of a client only extends to the case of the attorney for him; though, whether it ought to be extended further, I am happy to think, may be inquired into in this cause; for it is a matter of satisfaction to us that every step which we take, may be reviewed in another court if the defendant choose to tender a bill of exceptions; and therefore our opinion will not conclude the defendant."

Per CURIAM :

Rule discharged.

EX PARTE VILLERS AND OTHERS, IN A CASE OF
THE KING *v.* VILLERS.

(11 Price, 575—592.)

1823.
Jan 8.
[575]

[THE effect of the decision in the above matter is briefly stated with the report of the case at an earlier stage, in 22 R. R. 778, 785.]

IN THE EXCHEQUER CHAMBER.

ERROR FROM THE COURT OF EXCHEQUER.

GILES *v.* THE KING.

(11 Price, 594.)

1823.
Feb. 10.
[594]

[THIS is a stage of the case ultimately decided by the House of Lords under the name of *Giles v. Grover*, reported 1 Cl. & Fin. 72, and to be dealt with in the corresponding volume of the Revised Reports.]

1823.
Feb. 12.

BAGNALL v. UNDERWOOD.

(11 Price, 621—632.)

It is not necessary to give evidence to prove the truth of averments, in a declaration in an action for libel, according with statements in the publication.

[621]

[*622]

THE plaintiff in this cause, which was an action *for a libel, tried before Garrow, B. at the assizes at Stafford, was nonsuited by the learned Judge, on the ground that the office held by the plaintiff, and in respect of his conduct, in which the declaration stated that the defendant had published the libel complained of, was not shewn to be one of trust and confidence, as it was alleged to be in the declaration; but was proved not to be so, and therefore the action could not be maintained for want of evidence of a material allegation.

The first count of the declaration after the usual introductory averment, by way of inducement of the plaintiff's theretofore good repute, &c. stated, that before, &c. the plaintiff had been duly appointed to fill and hold, and had filled and held a certain office and place of trust and confidence, to wit, the office of overseer of a certain common field, situate, &c. and then (stating that he had always conducted himself properly therein) charged and set forth the libel. It alleged that the defendant composed, printed and published it, and caused, &c. of and concerning the said plaintiff, and of and concerning his conduct in his said office of overseer as aforesaid. The libel, as afterwards set out, appeared to be a printed handbill, signed by the defendant, and addressed to the inhabitants of Stafford, and it stated (with innuendoes) that at an adjourned meeting of the committee of the common field, it was ordered that the committee think proper to satisfy the inhabitants of the town respecting the different *charges laid against (the plaintiff) the late overseer of the common field for embezzlement, or not giving a proper account of the public property. It then enumerated various specific instances of the plaintiff having received money from several persons in respect of the field, for which he had not accounted, and concluded by observing that "the public will now consider how far the late overseer of the common was

[*623]

a proper person for the situation." There were five other counts in the declaration, all stating the libel to be of and concerning the plaintiff's conduct as such overseer. BAGNALL
"c.
UNDERWOOD.

The defendant pleaded the general issue and other pleas, by way of justification, alleging the facts as set out in the declaration in the terms of the libel. The plaintiff took issue on the pleas.

Jervis had obtained a rule to shew cause why the nonsuit should not be set aside, and a new trial granted on the following (amongst other) grounds: 1st, because it was not necessary, in this case, to support by positive proof the allegation in the declaration, that the office was an office of trust and confidence, it being mere matter of inducement: and the libel itself so stating it, had rendered that proof unnecessary, on the authority of the case of *Berryman v. Wise*.† * * *

Taunton, Campbell, and Russell shewed cause:

* * They distinguished this case from that of *Berryman v. Wise*. [626]
In that case, the question was not whether it was necessary for the purpose of maintaining the action for the plaintiff to prove that he was an attorney, but whether, having undertaken to prove it, he had adopted the right mode, or whether it was not necessary that he should prove it by his admission, or by a copy of the roll; but whether it was necessary to prove it at all did not come in question. The report of the case is so short that it does not give any precise information of the real point before the Court, and it is difficult to collect the ground of the decision, which is made the more obscure by the little which *BULLER, J.* is represented to have added when the determination was pronounced. It is clear, however, that in that case the averment was in some sort proved. * * *

Jervis, Puller, and Pearson in support of the rule. [627]

* * * * *

RICHARDS, C. B.: [630]

We are of opinion (the Court having conferred together for some time) that there ought to be a new trial in this case.

† 2 R. R. 413 (4 T. R. 366).

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v.
UNDERWOOD.

[*631]

There can be no doubt that it is plainly to be inferred from the general tenor of the paper which contains the libel on this occasion, *that it was the object of the party by whom it was put forth, to represent the person who was the subject of it as holding a situation of trust and confidence, and that he had abused it. We think that quite sufficient to sustain the allegation in the plaintiff's declaration, and that therefore it was unnecessary to require proof that the nature of the situation which he held, or to shew by evidence that it was an office of trust and confidence.

GRAHAM, B. :

I am of the same opinion. * * *

WOOD, B. :

[*632]

I concur in thinking that this nonsuit must be set aside. I was myself of counsel in the case of *Berryman v. Wise*, and I well recollect the ground of the determination, and can supply the alleged deficiency of the report. It was there distinctly held by the Court, that statements in a libel rendered it unnecessary to give evidence of the truth of averments in the plaintiff's *declaration corresponding with those statements: and that they have the effect of dispensing with formal proof.

If, as the defendant's counsel have urged, the averment of the nature of the situation was introduced into the declaration to enhance the damages, it may also be said that the expressions in the libel, from which it is to be inferred that the abuse of the duties of the situation held by the plaintiff, was an abuse of duties belonging to a place of trust and confidence, were a considerable aggravation of the slander; and it would be singular if we were to hold that evidence of the aggravated statements of a libel having no foundation in fact, may be used in diminution of damages.

I am clearly of opinion, on the principle of the case of *Berryman v. Wise*, which I think is founded on good sense, that this nonsuit ought to be set aside.

GARROW, B. submitted to the opinion of the rest of the Court, who therefore made the

Rule absolute.

K. B. (AT NISI PRIUS.)

1822.
Feb. 21.

[1]

DOE, ON THE SEVERAL DEMISES OF COLEMERE AND
OTHERS *v.* WHITROE.

(Dowl. & Ry. (N. P.) 1—3.)

A tenant may shew his landlord's title at an end, in ejectment brought against him by the landlord; but an occupier, who has paid rent to the tenant for life under a settlement, cannot, in an ejectment by the reversioner under the same settlement after the death of the tenant for life, dispute the plaintiff's title.

EJECTMENT to recover the possession of a dwelling-house and premises, situate in Peter Street, Westminster.

The case for the lessors of the plaintiff was this:—In the year 1799, one Colemere, being seised in fee of the premises in question, died, leaving a will, by which he bequeathed the estate to his wife for life, and at her death “to ——— Colemere, son of my cousin Joseph Colemere.” Joseph Colemere had two sons, and consequently there were three separate demises laid in the declaration, one by each of those sons, and a third by one Edward Colemere, the brother and heir at law of the testator. Several witnesses were called who had occupied the premises under the widow of the testator, *and had paid rent to her, and it was proved that the defendant, when possession was demanded of him, acknowledged that he had held under the widow up to the time of her death, and paid rent to her, and since her death under her executor, to whom he had also paid rent. The death of the testator, the due execution of his will, the death of his widow, and the identity of the two lessors of the plaintiff as described in the will, being proved,

[*2]

It was proposed for the defendant to give parol evidence of a declaration by the testator at the time when he built the house, that he had bought the ground of one Mrs. Morris, and had granted her an annuity for her life chargeable thereon; as also that Mrs. Morris was still living, and had a prior title to the premises, under an assignment, and under which the defendant

DOE.
v.
WHITROE. held; and the cases of *England v. Slade*,† and *Doe v. Ramsbotham*,‡ were cited in support of the admissibility of such evidence; but,

ABBOTT, Ch. J. :

The cases referred to will not bear the construction which it is now endeavoured to give them. They go no farther than to decide, that in an action of ejectment by the landlord against the tenant, the latter is not precluded from shewing that the title of the former to the premises has expired; and upon that point there can be no doubt. But the present is a very different case. This is an action by the reversioner, after the interest of the tenant for life has ceased, against the occupier; now, the interest of the tenant for life and of the reversioner is the same, and the present occupier, having paid rent to the first, and thereby acknowledged her interest, cannot set up a title in some third person, to defeat the interest of the latter. If there be any prior title existing in the person under whom the defendant claims to hold, he is of course at liberty *to prove it, but that can only be done by the production of the deeds in which that title originates.

[*3]

The defendant then produced documentary evidence in support of Mrs. Morris's title to the premises, but failed in identifying the premises there described with those for which the action was brought, and therefore the jury, under the learned Judge's direction, found a

Verdict for the plaintiff.

1822.
April 20.
[10]

WAITHMAN v. WEAVER AND OTHERS.§

(Dowl. & Ry. (N. P.) 10—12; S. C. 11 Price, 257, n.)

In an action for a libel, evidence of facts, tending but not amounting to a justification, cannot be received in mitigation of damages under the general issue.

THIS was an action for a libel on the plaintiff, contained in a newspaper called *The John Bull*, published by the defendants.

† 2 R. R. 498 (4 T. R. 682).

‡ 3 M. & S. 516.

§ Cited by CAVE, J. *Scott v.* r. 37.

Sampson (1882) 8 Q. B. D. at p. 504;
and see R. S. C. Ord. XXXVI.,

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v.
WEAVER.

The alleged libel imputed to the plaintiff that he had received a shawl, knowing it to have been stolen, and that he had committed perjury, by making a false return on oath as to the amount of his income, in order to evade the property tax. The defendants pleaded the general issue, Not guilty.

Vaughan, Serjt. for the defendants, proposed to call witnesses to give evidence of facts, short of a complete justification of the alleged libel, for the purpose of negating the presumption of malice. He contended, that he was at liberty to do so, on the authority of *The Earl of Leicester v. Walter*,† and *Knobell v. Fuller*.‡

Scarlett objected to the admissibility of such evidence, the defendants having pleaded only the general issue. The plaintiff had come prepared to explain every action of his life, which he thought might be brought into question, but it was impossible for him to be prepared to meet charges altogether unfounded. By the defendants' plea, the plaintiff had no reason to suppose that anything would be disputed but the publication of the libel, and the innuendoes in the declaration. To admit such evidence as this, would be a receipt in every case for a libeller to make his slander more bitter and galling. All that the libeller would have to do, would be to plead the general issue, by which he would lead the plaintiff to suppose that no evidence would be adduced, and then he might come into Court with a mass of *testimony affecting the character of his victim, and say, "True, I cannot justify the libel which I have published respecting you, but if I had written another libel I could have proved it." This could not be permitted. It was the common practice, if a defendant could not justify all, to justify a part of the libel, and produce witnesses to prove the part justified, as a ground of mitigation and reduction of damages; but under the plea of the general issue, it would be most dangerous to admit facts in evidence, for the purpose of proving the truth of any part of the libel, by which means a greater injury might be inflicted on the plaintiff

[*11]

† 2 Camp. 251. [That case is L. J. Q. B. 380.—R. C.]
expressly overruled in *Scott v.* † 4 R. R. 896 (2 Peake, 139).
Sampson (1882) 8 Q. B. D. 491; 51

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WEAVER.

than could be effected by the original libel, because he would come unprepared to meet the reiterated slander. This case was distinguishable from the cases cited, because they only went to establish that evidence of rumours might be admitted, to shew that the plaintiff having previously lost his character, he had sustained no injury. No case had yet distinctly decided, that facts might be received in evidence to mitigate the damages, where no plea of justification was set out on the record.

Vaughan, Serjt. observed, in reply, that the plaintiff could not be supposed to come unprepared, because he knew the circumstances to which the libel alluded. It might happen that the peculiar form of the libel (perhaps founded substantially in truth), might preclude the formal justification of any part of it; and therefore it was most important, in inquiring into the design of the defendant, to ascertain whether he had only mistaken the real facts, or had invented an entire falsehood.

ABBOTT, Ch. J. :

[*12]

I am clearly of opinion that I ought not to receive the evidence which is proposed to be offered. The case of *The Earl of Leicester v. Walter* is very different from the present. There, evidence of rumours was *admitted to shew that the plaintiff having previously lost his character, had sustained no injury; but here it is proposed, not to give rumours, but facts, in evidence, and there is a vast distinction between rumours and facts. I think the rule is not so laid down in any of the cases which have been decided upon this subject, as to preclude the exercise of my own judgment; and I am decidedly against the reception of the evidence proposed to be adduced. I own I have always thought the rule to be, that under the plea of the general issue, facts cannot be given in evidence, unless they are pleaded as matter of justification, and I have never been satisfied with any of the cases which lay down a different position. I shall reject the evidence, but the defendants may either tender a bill of exceptions, or move for a new trial, and have the question more deliberately argued in the Court above.

The evidence was rejected, and the point was not afterwards mooted. WAITHMAN
v.
WEAVER.

The jury, under the directions of the learned Judge, found
For the plaintiff, damages 500l.

ATKINSON v. LAING.

(Dowl. & Ry. (N. P.) 16—17.)

1822.
May 22.
[16]

Where a partnership between two persons in trade had been dissolved, and one of them carried on business afterwards, and was entitled to the assets. Held, that he might maintain assumpsit alone for goods sold and delivered to the defendant during the existence of the partnership.

ASSUMPSIT for goods sold and delivered.

After proof of the ordinary case in support of the plaintiff's demand, it appeared, that at the time of the transaction out of which the cause of action arose, the plaintiff was in partnership with a person of the name of Loder; that their partnership had since in fact ceased; but that the business was still nominally and ostensibly carried on under the firm of "Loder & Atkinson;" and

It was objected for the defendant, that, upon this evidence, the action was not well brought in the name of Atkinson alone. At the time of the sale of the goods there were two partners, and though one had since retired, yet, as the cause of action arose while Loder was a partner in the trade, and as the plaintiff still carried on business under a joint firm, and held himself out to the world as a partner with Loder, the latter was in fact a party to the whole transaction, and ought to have been joined in the action; but,

ABBOTT, Ch. J. said:

He thought the action was well enough brought in the name of the plaintiff alone. If the defendant had had a set off or counter demand, originating in transactions between himself and Loder and Atkinson jointly, then it would have been necessary to include Loder as a plaintiff in this action; but, otherwise, and as Atkinson * was really entitled as

[*17]

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v.
LAING.

remaining partner, it made no difference to the defendant in which name the claim upon him was made; and therefore the present action was maintainable. †

Verdict for the plaintiff.

1822.
July 6.

HARRIS AND OTHERS v. HILL AND OTHERS.

(Dowl. & Ry. (N. P.) 17—18.)

[17]

On an issue as to the liability of defendants as partners, an attorney subpoenaed to produce a composition deed, executed between the defendants and another firm who were clients of the witness, may object to the production of the instrument on the ground that its disclosure would prejudice his clients.

ASSUMPSIT on a bill of exchange, accepted by the defendants.

To prove the liability of some of the defendants as partners, in a firm called "The Foxhill Stone Pipe Company," the plaintiffs' counsel called a witness to produce a deed of composition, executed between the defendants and "The Middlesex Waterworks Company," for the purpose of shewing that the defendants were all executing parties to the deed, as members of the firm, on whose behalf the bill of exchange in question was accepted.

[*18]

The witness, who was attorney for the Middlesex Waterworks Company, produced the deed, but objected, on behalf of his clients, that it ought not to be read, inasmuch as it contained matters which might be prejudicial to their interests. There had been disputes between "The Middlesex *Waterworks Company," and "The Foxhill Stone Pipe Company," and the deed of composition, if now read, might be prejudicial to the former in their proceedings against other parties in the Court of Chancery.

Copley, S.-G., for the plaintiff, submitted that the deed ought to be read, notwithstanding the objection urged by the

† This ruling has been characterised as "more than questionable." Lindley on Partnership, 6th ed., p. 296. The assumption that the retired partner had no beneficial

interest, which appears to be its foundation, also appears to go beyond the recognized bounds of judicial notice. Still the case has never been overruled.—F. P.

witness. He admitted that in the case of title deeds the interests of third parties ought not to be prejudiced by the disclosure of evidence in their possession, however important to the parties at issue; but he contended, that the rule laid down in such cases ought not to be extended to the present, where the object was merely to shew a partnership between the defendants.

HARRIS
v.
HILL.

ABBOTT, Ch. J. :

I cannot order the witness to produce the deed, if he informs me that the disclosure of its contents may prejudice his clients; and I can draw no distinction between this and the ordinary case, where a third party is called upon to produce the title deeds of his estate, and who may object to the disclosure of his title.

The evidence was therefore not read.

MUIR, ADMINISTRATOR OF MUIR, DECEASED, v. FLEMING.

(Dowl. & Ry. (N. P.) 29—30.)

1822.
May 24.

[29]

If a policy of insurance is left in the hands of an agent, merely for safe custody, though he advances money to the assured, without any other security than the policy, the agent acquires no general lien on the instrument for such advances; *sed aliter* if left with him as a security generally.

DETINUE for a policy of insurance for 1,500*l.*, effected upon the life of the plaintiff's intestate, a merchant at Edinburgh, remaining in the hands of the defendant, his agent in London, and on which the latter claimed a general lien, upon a balance of accounts between himself and the deceased.

On the part of the plaintiff it was proved, that the intestate died insolvent, and that the plaintiff, before the action was commenced, had tendered to the defendant the sum of 180*l.*, the balance due from the intestate's estate to the defendant upon the face of the accounts then in the plaintiff's hands, for one year's premium upon the policy, which had been paid by the defendant, and for interest generally, which the defendant had refused to accept.

MUIR
v.
FLEMING.

It was proved, on the other hand, that the policy was effected in the year 1810, and had been immediately placed in the defendant's hands; that the defendant had regularly paid the premium upon it; that the defendant both before and since the date of the policy had been in the habit of making advances for the intestate, for which he never had any other security than the policy; that the account was generally against the intestate; and that the defendant had advanced to the plaintiff the money necessary to defray the expenses of taking out letters of administration. Upon this evidence it was contended, that the defendant had a general lien upon the policy for the amount of his claim upon the intestate, and that therefore he could not by law be compelled to give up the possession of it until that claim was satisfied.

[30]

ABBOTT, Ch. J. :

I am of opinion that the defendant in this case is not an agent in the meaning of the word, which is necessary to confer a general lien. In a case like the present, a general lien can be claimed only in respect of a general balance of accounts, and it does not seem to me that we have any decisive evidence here that there ever existed any general balance of accounts between the parties. But a special contract may raise a special lien, and I shall therefore leave it to the jury, as a question of fact, to say whether the policy of insurance was left in the hands of the defendant, merely as the agent of the intestate, for safe custody, or whether it was deposited with him as a security for his advances, telling them, that in point of law, in the former case, their verdict must be for the plaintiff, and, in the latter, for the defendant.

The jury found for the defendant.

WILSON v. TUCKER, EXECUTRIX OF TUCKER.†

(Dowl. & Ry. (N. P.) 30—33; S. C. 3 Starkie (N. P.) 154.)

1822.
Oct. 30.

[30]

The executrix of an attorney is liable in case for the negligence of her testator, in not making due inquiry into the validity of a security upon which his client proposes to advance money. It seems, however, that the duty of an attorney is not so strict, but that if he is lulled by the assurance of his client into a persuasion that the security is good, so as to abate his vigilance in the inquiry into its validity, his liability for negligence is discharged.

CASE against the executrix of an attorney, for injury sustained by the negligence of the testator, in not duly *examining a will previous to preparing an assignment of a legacy to the plaintiff, as a security for the sum of 210*l.* advanced by him to a borrower.

[*31]

The facts not disputed were these. The plaintiff being applied to by a Mr. Freshfield to make him an advance of money upon the security of a legacy under the will of a relation, by way of assignment, employed the testator, an attorney, to prepare the deed, which he did, and the money was advanced. It turned out that the bequest in the will, was qualified by a condition, that if any legatee should "assign his legacy," or should in any manner conduct himself in reference to the will, "so as to give trouble to the trustees," his legacy should become absolutely void. The assignment led to a suit in equity, which terminated in a decree declaring the legacy void, and the security becoming unavailing, the plaintiff now sought in this action to recover the damages thereby sustained. A letter from the testator to the plaintiff was admitted, in which he adverted to some doubts which had been raised as to the validity of the legacy, but added, that he thought the objection must fail, as the assignment was not calculated "to give any trouble to the trustees."

To prove direct instructions to the testator to examine the will, a witness was called, who stated, that she accompanied the plaintiff to Mr. Tucker's, and heard the former request the latter to prepare the assignment, and to go to Doctors' Commons and examine the will, at the same time warning him to pay no

† This case is referred to in the *Keeping and Gloag* (1888) 58 L. T. judgment of STIRLING, J. in *Re* 679, 680.—R. C.

WILSON
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TUCKER.

regard to anything Mr. Freshfield might say ; and that at a subsequent interview, Mr. Tucker said to her, he was afraid Mr. Wilson would lose his money, adding, “ if he does not, I shall.”

[*32]

For the defendant, the testator's clerk was called, who was present at the time the supposed instructions were given, *and negatived any mention of Doctors' Commons being made. The plaintiff merely gave orders for the assignment, adding, that he knew the security was good, as he had inquired of the trustees ; and upon this evidence it was contended, that the plaintiff's own conduct was such as to lull the testator's vigilance to sleep, and to exonerate him from those precautions which it would otherwise have been his duty to take, and consequently that the plaintiff could not recover.

ABBOTT, Ch. J. :

It appears in this case, that an extract from the will containing the legacy to Freshfield, was furnished by the plaintiff to the testator, and no more, and the complaint against him is, that he rested satisfied with that extract, and did not examine *all* the will, as it is contended he ought to have done. In point of law it was clearly his duty, as the attorney employed by the plaintiff, to examine the whole of the will, unless anything was said or done by his employer which could fairly and reasonably lead him to think that such a precaution was unnecessary. If the plaintiff really charged him to examine the will, then he was clearly guilty of the negligence imputed to him by omitting to do so,—if, on the contrary, the plaintiff told him, that he knew the will was sufficient and the security good, his caution might perhaps be not unnaturally lulled to sleep, and his liability in consequence removed. Upon this point there is contradictory evidence ; but there are other important facts uncontradicted ; namely, that Mr. Tucker, on one occasion, when speaking of the transaction, said, “ If Wilson don't lose the money, I shall ; ” and that in his letter to the plaintiff he betrays both a consciousness of neglect, and a desire to avoid the consequences of it, by misrepresenting the import of the disqualifying clause in the will. It is peculiarly for a jury to decide upon such evidence, but they should, I think,

be strong facts which are held sufficient to absolve an attorney from those duties and liabilities which *the law imposes on him, and the benefit of which it is the very object of his employer to secure.

WILSON
TUCKER.
[*33]

The jury found for the plaintiff.

LACON v. HIGGINS, ALIAS ISAAC.

(Dowl. & Ry. (N. P.) 38—47; S. C. 3 Starkie, 178.)

1822.
Dec. 19.
[38]

The validity of a marriage celebrated in a foreign country, must be determined in an English Court by the *lex loci*, where the marriage is solemnized.

On a plea of coverture, where the parties, who were British subjects, were married in France: Held, that if the marriage would not be valid in that country, it would not be valid in this.

A printed copy of the "Cinq Codes" of France, produced by the French vice-consul, resident in London, purchased by him at a book-seller's shop at Paris, received as evidence of the law of France, upon which this Court would act.

ASSUMPSIT for goods sold and delivered, and work and labour, with the common money counts. The defendant pleaded coverture, and averred, that before and at the time of making the several supposed promises and undertakings mentioned in the declaration, she was and still is the wife of one Henry Higgins. Replication denied the marriage, and issue thereon.

To sustain the defendant's plea of coverture it was proved by one witness, that in January, 1818, (being then the widow of a gentleman named Isaac) she was married at Versailles, in France, to a gentleman named Henry Higgins, according to the rights and ceremonies of the Church of England, by a clergyman of the establishment. The defendant and her husband had been previously residing in Paris, were both British subjects, natives of Ireland, and were stated to be of the Roman Catholic persuasion. They had gone from Paris to Versailles for the purpose of being married. The ceremony was performed at an hotel, in the presence of two witnesses, one of whom was a relative of Mr. Higgins, and the other was the defendant's waiting woman. The latter being resident abroad she could not be produced. It was stated that the clergyman had written a certificate of the

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marriage, and delivered it to the parties, but that document was not given in evidence. After the marriage was so solemnized, it was proved by *several witnesses that the parties cohabited together as man and wife, and both in England and Ireland were received as such among their respective relatives, friends, and acquaintance. There was no proof that at the time the debt in question was contracted they cohabited; but it was stated generally, that ever since the marriage they had lived together as man and wife, and had had one child. It was stated that British subjects, resident in Paris, were usually married at the English ambassador's, where a register of marriages solemnized there was regularly kept. On this evidence the defendant's case rested.

Scarlett (with whom were *Espinasse* and *Dowling*) for the plaintiff, in answer to this case, proposed to shew, that by the law of France, the marriage of the defendant, celebrated in the manner stated, was invalid, and consequently could not support the plea of coverture. There could be no doubt that the validity of a marriage, celebrated out of England, must be determined according to the laws of the country in which the ceremony takes place. If this marriage would be invalid in France, it followed as a consequence, that it would be invalid in England. For this the case of *Dalrymple v. Dalrymple*,† decided by Lord STOWELL, is an express authority. There the question was, whether the marriage between the parties was valid according to the laws of Scotland; the learned Judge deciding that the validity of the marriage must be determined by the laws of the country in which it was solemnized. The only question then was, as to the mode of proving the *lex loci* in this case. For this purpose he proposed to call the French vice-consul, resident in London, who had in his possession a printed copy of "Les Cinq Codes" of France, forming part of the library of his office. This, he submitted, was the best evidence which could be produced upon such a *subject; and this Court, in determining the validity of the marriage, must act upon the French law so proved.

[*40]

† 12 Haggard's Cons. Rep. 54.

ABBOTT, Ch. J. said he would first hear the witness before he decided upon the admissibility of the proof proposed to be offered.

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M. Philip François Nettement, vice-consul of France, resident in London, was then examined. He produced a printed copy of "Les Cinq Codes," purporting on the title page to be published by authority of the Government of France. He said the book now produced was part of the library of his office. It contained the written law of France, and was the book upon which he acted in his office of vice-consul, when any question arose as to the law of France. The "Cinq Codes" was printed by the authority of the French Government, and the copy now produced was similar to those copies upon which the municipal authorities and judicial tribunals of France would act. The "Cinq Codes" was a digest of the customary and written laws of France, as they prevailed in their various modifications throughout the provinces of France prior to the Revolution. There were now no written records of the law of France, as in this country, with respect to the law of England.† The copy of the codes in his possession was not delivered to him by any official functionary of the French Government; he purchased it at a bookseller's shop in Paris, for the use of his office; and importing on the title page that it was printed by authority, and believing the fact to be so, he acted upon it in his official capacity.

Copley, S.-G. (with whom was *F. Pollock*) for the defendant, contended that this was not sufficient proof of the law of France. It was an established rule of evidence, that in order to prove in a Court of Justice in this country the law of a foreign country, an attested copy of the law *must be produced.‡ No such proof in this case had been given. The book now produced must have been printed from some written records. Supposing it to have been printed from a digested compilation of the customary and written law of France, as stated by the witness, still the digest

[*41]

† [Sic, but the sense is obscure.— 433 (7 T. R. 241); *Clegg v. Levy*,
F. P.] 3 Camp. 166; *Inglis v. Usherwood*,

‡ Vide *Alves v. Hodgson*, 4 R. R. 1 East, 515; and *Bohtlingk v. Inglis*,

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must be written and deposited in the archives of the French legislature, so that an authenticated copy of it might have been produced. But supposing this not to be requisite, what proof was there that the book now produced was a genuine publication? The witness stated that he had bought it at a bookseller's shop in Paris; it was not delivered to him officially by any functionary of the French Government, to act upon in his character of vice-consul, and therefore there was not the best evidence, even of this description, which might have been produced. The Court could not act upon such evidence of the law of France. It must be proved to be an authentic copy, by a comparison, at least, with the original from which it was printed.

[*42]

Flannagan, amicus curiæ, mentioned that in *Sir Thomas Picton's* case,† where the question arose as to the right *of inflicting torture in the island of Trinidad (formerly under the dominion of Spain), the Attorney-General of the island was examined as a witness, and the Court allowed him to refer to printed books purporting to contain the law of Spain, as it was understood to exist in the island with respect to the jurisprudence of the colonial settlements of that country. In that case

7 R. R. 490 (3 East, 381). The principle laid down in these cases was acted upon in

brought, being made in Scotland, the plaintiff should have proved at the trial that, by the law of Scotland, the defendant was liable. But

BROWN v. GRACEY.†

1821.
MICH. TERM.

(Dowl. & Ry. (N. P.) 41 n.)

If a promissory note, made in Scotland, be sued upon in this country, and there is any difference between the law of the two countries as to the liability of the defendant, it lies upon the latter to prove the difference.

THIS was an action upon a promissory note and the money counts. Verdict for plaintiff.

Gurney moved for a new trial, upon the ground that the whole of the contract, on which the action was

ABBOTT, Ch. J., said, that if the law of Scotland differed from the law of England as to the liability of the defendant, it lay upon the defendant, and not the plaintiff to shew it. The other Judges were of the same opinion.

Rule refused.§

† 30 Howell's St. Tr. 514, *et seq.*

‡ See this case cited and the principle confirmed by the judgment of the Court delivered by WILLES, J., in *Lloyd v. Guibert* (1865) L. R. 1 Q. B. 115, 129; 35 L. J. Q. B. 74, 80.—R. C.

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Lord ELLENBOROUGH, Ch. J., expressed no doubt that such books were receivable as evidence of the law of Spain and of Trinidad, and they were accordingly acted upon in discussing the question then under consideration.†

Scarlett, in reply, was stopt by

ABBOTT, Ch. J., who said the general rule certainly was, that the written law of a foreign country must be proved by an examined copy before it could be acted upon in an English Court; but, according to his recollection, printed books upon the subject of the law of Spain were referred to and acted upon in argument in *Sir Thomas Picton's* case, as evidence of the law of that country, and therefore he should act upon that authority, and receive the printed copy now produced as evidence of the law of France.

“*Les Cinq Codes*”‡ was then received, and the plaintiff's counsel relied upon lib. 1, tit. 11, cap. 3, and the following articles in the “*Code Civil*”:—

Art. 63. Before celebration of marriage, the officer of the civil state shall make two publications at eight days' interval, on Sunday, before the door of the town-hall. Such publications, and the act of them to be drawn up, shall set forth the prenomen, names, professions, and domiciles *of the future couple, their state, either of full age or minority and the prenomens, names, professions, and domiciles of their fathers and mothers. The act shall set forth moreover the days, places, and hours, where the publications shall have been made; it shall be inscribed upon a register by itself, which shall be marked and certified in manner prescribed by article 41,§ and deposited at the end of each year in the registry of the tribunal of the district.

[*43]

Art. 64. An extract of the act of publication shall be affixed

† In that case the objection was waived, the Spanish law books being referred to by consent.

‡ Vide Barrett's Verbal Translation of the Code Napoleon.

§ Art. 41. The registers shall be numbered from first to last, and each leaf shall be signed by the president of the tribunal of First Instance, or by the Judge supplying his place.

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at the door of the town-hall, and shall remain so during the eight days' interval, between the one and the other publication. The marriage cannot be celebrated before the third day after, and exclusive of that of the second publication.

Art. 68. In case of opposition, the officer of the civil state may not celebrate the marriage before his receipt of the dismissal, under pain of a fine of 300 francs and all damages.

Art. 74. The marriage shall be celebrated in the township where one of the couple shall be domiciled. Such domicile, as to marriage, shall be established by six months' continued habitation in the same township.†

[44] ABBOTT, Ch. J., said he should have great difficulty in pronouncing that this marriage was void for non-compliance with the French law so expressed, unless there was a nullifying clause.

The French vice-consul was then examined again, and he stated, that from his education and habits he was conversant with the law of France. Speaking from his knowledge of the administration of the marriage law of France, he deposed, that marriages celebrated in that country, contrary to the articles 68, 64, and 74, were absolutely null and void. A marriage in

† 63. Avant la célébration du mariage, l'officier de l'état civil fera deux publications, à huit jours d'intervalle, un jour de dimanche, devant la porte de la maison commune. Ces publications, et l'acte qui en sera dressé, énonceront les prénoms noms, professions, et domiciles des futurs époux, leur qualité de majeurs ou de mineurs, et les prénoms, noms, professions, et domiciles de leurs pères et mères. Cet acte énoncera en outre les jours, lieux et heures où les publications auront été faites : il sera inscrit sur un seul registre, qui sera coté et paraphé comme il est dit en l'article 41, et déposé à la fin de chaque année au greffe du tribunal de l'arrondissement.

64. Un extrait de l'acte de

publication sera et restera affiché à la porte de la maison commune pendant les huit jours d'intervalle de l'une à l'autre publication. Le mariage ne pourra être célébré avant le troisième jour, depuis et non compris celui de la seconde publication.

68. En cas d'opposition, l'officier de l'état civil ne pourra célébrer le *mariage avant qu'on lui en ait remis la main-levée, sous peine de trois cents francs d'amende, et de tous dommages-intérêts.

74. Le mariage sera célébré dans la commune où l'un des deux époux aura son domicile. Ce domicile, quant au mariage, s'établira par six mois d'habitation continue dans la même commune.

[These provisions are still in force.]

[*44, n.]

violation of these articles was in fact no marriage at all; and the issue of such marriages were bastardized. A marriage between British subjects, if solemnized according to the law of England, at the British ambassador's, is recognized as valid, but then it must be registered by the ambassador, to render it operative there; but if the parties are not married at the British ambassador's, they must comply with the law of France, in like manner as French subjects. Even if persons lived together, and were acknowledged as man and wife, that circumstance would not avail if the legality of the marriage came afterwards into question. Upon this evidence, coupled with the law above-mentioned,

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ABBOTT, Ch. J. said :

The result was indisputable; the only doubt he had was, whether the evidence of the French law was properly received. If he were to hold that the evidence was not receivable, the plaintiff must be nonsuited; but if he were to admit it, then the defendant would be entitled to move for a new trial, which would put the parties to farther expense. He was prepared now to give his opinion *upon the question as to the validity of the marriage, with reference to the French law, if the parties were disposed to abide by his decision, without carrying the question farther.

[*45]

The counsel on both sides agreed to waive all objection as to the admissibility of the evidence of the marriage law in France, and abide by the decision of his Lordship upon the effect of the law as proved; upon which

ABBOTT, Ch. J. said :

I am clearly of opinion then, that according to the law of France, this marriage is invalid, and consequently must be so considered in an English court of justice. I take it according to the general rule laid down by Lord STOWELL in *Dalrymple v. Dalrymple*, that a marriage celebrated out of England is valid or invalid in England, according as it would be valid or invalid in the country in which it is celebrated. In that case the whole inquiry was, whether the supposed marriage between the parties

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was a valid marriage according to the law of Scotland, in which country the contract took place, and the decision of the Court was, that it was a valid marriage. The question in this case is, whether, assuming the marriage to have been celebrated at Versailles in the manner mentioned it is or is not a valid marriage according to the law of France. I am of opinion that if it is void there, it is void here. According to what has been said by the French vice-consul, and upon reference to the "Code Civil," which contains the written law of France, a marriage in that country requires to be performed, with a great variety of circumstances and formalities. Those who complain of the circumstances requisite to make a marriage valid by the English law, may look with complacency to our laws upon the subject of marriage, when compared with those of France, which require much greater notoriety of publication to render the contract valid ; but we have nothing to do with the policy *of the French law in the consideration of the present case. I do not find any express declaration that a marriage celebrated otherwise than in compliance with the articles which have been read, shall be deemed null and void, but the language of articles 63 and 64 seems expressly to require certain things to be done before the marriage shall be celebrated, and article 74 requires, that the parties shall be domiciled six months in the township where the marriage is celebrated before it can be solemnised. Now, in this case, none of these requisites have been complied with, nor is there any circumstance which takes it out of the general operation of these laws. The marriage is not celebrated at the British ambassador's residence, so that it is a case falling within the operation of the general law ; and the vice-consul, who states himself to be well-acquainted with the laws and customs of France, says, that the marriage ceremony, if otherwise solemnised than as required by the articles mentioned, is invalid and inoperative ; consequently if this would be a bad marriage in France, I am bound to say that it is also bad in England. As the parties have agreed to abide by my opinion upon the effect of the French law, in the manner proved in evidence, the issue upon the coverture must be found for the plaintiff.

Verdict for the plaintiff.

ASHBOURNE, ADMINISTRATOR OF HOLNE *v.* PRICE,
GENT., ONE, &C.

1823.
Jan. 4.

(Dowl. & Ry. (N. P.) 48—49; S. C. s. n. *Ashford v. Price*, 3 Starkie, 185.)

[48]

Where an attorney's clerk admitted, on the taxation of costs before the Master, that the suit in which the costs were taxed was conducted by his employer from motives of charity, on behalf of the plaintiff: Held, that the clerk was such an agent as to bind his master by such admission.†

ASSUMPSIT for money had and received.

The defendant, an attorney of this Court, had conducted a suit for the intestate, a seaman, employed on board a South Sea whaler, against his captain, for wages, and recovered a verdict, with damages to the amount of 25*l.* 18*s.* 5*d.*, which sum he received from the attorney for the defendant in that suit, but which he had refused to pay over to the present plaintiff, who claimed it as administrator of the intestate, upon the ground that, on a balance of accounts between them, the intestate was indebted to him in a sum exceeding the damages recovered, for the costs of conducting the action. To rebut this defence, it was proposed to prove a declaration on the part of the present defendant that he had undertaken the suit for the intestate from motives of charity, and that he had agreed, in the event of obtaining a verdict, not to charge him any extra costs, but to be satisfied with those paid by the defendant in that action. For this purpose a witness was called, who stated, that at the taxation of costs in the former suit, a clerk of the defendant who attended on that occasion as his representative, said, "he hoped the master would make as liberal an allowance as he could, because Mr. Price had undertaken the cause from charitable motives, and had promised his client (the intestate) not to charge him any extra costs;" and that on a subsequent day the same declaration was repeated *by the same person in the presence of the defendant Price who did not contradict or object to it.

[*49]

It was contended for the defendant, that the declaration of a clerk, as to the terms upon which his master had undertaken

† See *Jennings v. Johnson* (1873) that such an agreement should be in L. R. 8 C. P. 425, where a contention writing was disregarded.—R. C.

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any particular cause, was not admissible in evidence against the latter, but that it must be proved out of the mouth of the defendant himself. There was nothing in this case to take it out of the general rule of law, which excluded hearsay evidence. In the case of an action upon the warranty of a horse, sold by a servant for his master, the servant's declaration of soundness would not be evidence to prove a warranty by the master; and that was a parallel case with the present.

ABBOTT, Ch. J. said:

The case supposed was distinguishable from the present, because there was not, in the instance of a groom selling a horse for his master, that direct and positive agency which existed on the part of an attorney's clerk attending to tax the costs of an action conducted by his employer. In this case the clerk was clothed with a full and immediate agency by and for the defendant; he appeared and acted as his representative, by his instructions, and for his benefit and convenience; and standing in that close and intimate connection with him, the declaration of the one was, in effect, the declaration of the other, and was therefore admissible in evidence. These circumstances appeared to him to take this case out of the general rule of law, and therefore upon the whole he thought it right to let in the evidence.

The case went to the jury, under these circumstances, without any substantial defence, and they found a

Verdict for the plaintiff.

1823.
Jan. 10.
[50]

LEE v. NEWSAM.

(Dowl. & Ry. (N. P.) 50—52.)

A tradesman having in the course of business received a banker's cheque, which had been stolen from the payee, and given the difference to a stranger who presented it, in payment of an article purchased, brought assumpsit against the drawer for the amount: Held, in the absence of fraud and negligence on his part, that the action was maintainable.

ASSUMPSIT against the drawer of a banker's cheque.

The case was this:—A cheque, dated 25th October, 1822, for

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NEWSAM.

the sum of 7*l.*, drawn by the defendant upon Messrs. Frys and Chapman, his bankers, payable to C. W. Payne or bearer, was, on the evening of the day of the date stolen from the payee, and at about eight o'clock the same evening presented by a female, apparently a servant, to the plaintiff, a retail grocer, in payment of the sum of eight shillings, the value of one pound of tea then purchased by her, when, after a slight enquiry where she came from, he took the cheque, and gave in change six sovereigns and twelve shillings. Neither the person who presented the cheque, nor the individual to whom she referred as her master (and which reference turned out to be false), nor the drawer of the cheque, was known to the plaintiff at the time when he thus cashed it. On the following day, when the plaintiff presented the cheque at the bankers, he was told they had orders not to pay it, and upon a subsequent application to the defendant, he also refused to pay the amount. At one time, when questioned as to the transaction, and asked whether he had given full value for the cheque, the plaintiff rather hesitated in his reply, and was in consequence taken before the Lord Mayor, on the criminal charge of having received the cheque for less than its value, knowing it to have been stolen; but was, after a full investigation of the case, discharged.

Upon these facts it was contended, on the part of the defendant, that the action was not maintainable. Upon the evidence in the case the plaintiff had unquestionably *been guilty, either of such fraud in knowingly purchasing, or of such negligence in carelessly receiving the cheque, as must, on either ground, utterly disqualify him for setting up any claim for the amount against the defendant. After the investigation that had taken place before another tribunal, it would perhaps be too much to impute to the plaintiff the criminal act of fraudulently purchasing the cheque, but a very clear and cogent case of negligence had certainly been made out against him. The general unfrequency of a banker's cheque being tendered for payment in a retail tradesman's shop, and that particularly by an ordinary servant, the very small value of the article purchased in comparison to the amount of the cheque, the plaintiff's utter

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ignorance of the drawer of the cheque, or the person by whom it was presented, and of the party by her referred to, were circumstances which ought to have raised a suspicion in his mind that the cheque had been dishonestly obtained, and should have roused his vigilance and attention to the interests of the public. By his culpable negligence a fraud had been committed, the consequences of which must fall either upon the defendant or upon himself, and as he might have prevented the one, he ought to bear the other. Upon this principle, which was by no means new, having been acted upon in several decided cases, the plaintiff was not entitled to recover. The cases of *Miller v. Race*,† *Grant v. Vaughan*,‡ and *Mead v. Young*,§ were cited.

ABBOTT, Ch. J.:

[*52]

There is no doubt that a man who purchases a banker's cheque for less than its value, and knowing it to have been dishonestly obtained, is by law disqualified from recovering the amount from the drawer. But I think that point may be left out of the present case; for there seems no ground for imputing to the plaintiff any criminal knowledge or any fraudulent intention, in the transaction. Another question however remains; for if he has acted with *culpable negligence on this occasion, if the circumstances were such as might and should reasonably have excited his suspicions, then he has in point of law forfeited his claim against the defendant, and is not in a situation to maintain this action. This however is a question entirely for the jury to decide.

The case was left to the jury upon this footing, and they found a

Verdict for the plaintiff.

† 1 Burr. 453.

‡ 3 Burr. 1516.

§ 2 R. R. 314 (4 T. R. 28).

HILL AND OTHERS v. HEAP AND OTHERS.†

(Dowl. & Ry. (N. P.) 57—59.)

1823.
Jan. 11.

[57]

Declaration by payees against drawers of a bill of exchange averred presentment to and non-payment by drawers, neither of which averments was proved: Held, that notice to the drawers was waived by proof of an order given by the latter to the drawees, not to pay the bill if presented; but *aliter* as to the fact of presentment, though the payees were informed of such order before the bill became due.

ASSUMPSIT by the payees against the drawers of a bill of exchange. Plea, first, Non assumpsit; and second, a set off for money lent, and issue on both pleas.

The plaintiffs constituted the firm of "The Stone Pipe Company," carrying on business at Foxhill in Gloucestershire. The defendants were trustees appointed by "The Manchester and Salford Water Works Company," for the payment of their debts. The bill was in these terms:—"MANCHESTER, 24th October, 1816.—Messrs. William Jones, William Fox, Edward Lloyd and Co., pay the Stone Pipe Company, or order, the sum of three hundred and ninety pounds, seven shillings, and eleven pence, and place the same to our account as trustees of the Manchester and Salford Water Works. WILLIAM HEAP, THOMAS GREAVES, GEORGE BRIDGES, WILLIAM EVERETT." The declaration averred a presentment to, and refusal to pay by the drawers, and due notice of non-payment to the drawers, but no evidence was given in support of those averments, the fact being that the bill never was so presented, and no notice of non-payment given; but it appeared that the defendants had given orders to the drawers not to pay the bill if presented, and that those orders had been communicated to the plaintiffs. Upon this evidence it was objected that the plaintiffs must be non-suited, inasmuch as it was incumbent upon them to prove these averments in the declaration, notwithstanding the evidence thus given.

In answer to the objection it was contended, that the plaintiffs were exonerated from the duty both of presenting the bill to the drawers for payment, and of giving notice of *non-payment to the drawers.* * *

[*58]

† See Bills of Exchange Act, 1882, s. 46 (2); s. 50 (2) (c) (5).—R. C.

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ABBOTT, Ch. J. :

I am clearly of opinion, upon the authority of the cases cited, that the defendant's order to the payees not to pay the bill if it was presented, did amount to a dispensation of the notice of dishonour; but I am equally decided in my opinion, that it formed no excuse for the non-presentment for payment; for I find this very distinction taken by Lord ELLENBOROUGH, in *Prideaux v. Collier*.† The rule which has been referred to with respect to the proof of actual damage and the presumption arising from the absence of such proof, cannot weigh with me now, because I find that it has been repeatedly contravened, and is now considered as exploded, and as it seems to me very properly so; because it is always to be presumed, until the contrary appears, that the drawer has effects in the drawee's hands, and that he will be damnified by an omission to present the bill at the drawee's and the contrary can be ascertained only by the holder presenting it there and making the inquiry. In this case, therefore, the plaintiffs have been guilty of laches, of which the defendants are entitled to the benefit, and therefore the plaintiffs must be nonsuited.

Plaintiffs nonsuited.

† 2 Stark. 57.

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APPROPRIATION—Of cargo.—A. had, for the purpose of sale, consigned a cargo of fish to B., who was in correspondence and connected with the house of C. C. had advanced money to A., on an engagement from A. that the proceeds of the cargo of fish should be remitted by B. to A. through the hands of C., in order that they might so constitute a security for the money advanced by C. A. then wrote to B., telling him that the cargo of fish was not responsible for any advances made by C. Notwithstanding this B., after the receipt of A.'s letter, remitted the proceeds to C., who retained them to cover his advance. A. having become bankrupt, and his assignees having sued B. for these proceeds:

Held, that a jury was warranted in considering A.'s engagement as an appropriation of the cargo of fish, which he could not rescind, and not a mere order for payment of money, which could be revoked by a subsequent countermand before payment. *Fisher v. Miller* 607

ARBITRATION—1. Award made without hearing defendant's witnesses.—A defendant having at the trial of an action agreed to enter into a rule of *nisi prius* to repair and reinstate premises which he had wrongfully damaged, it was referred to a barrister to settle what sum should be paid in lieu of his doing this. The defendant's attorney produced no witnesses at the first meeting, of which he had ample notice, but the plaintiff's witnesses gave in their estimate, and the arbitrator, after viewing the premises, appointed a day for a second meeting. The defendant's attorney called before that day, and said that his witnesses (two surveyors, who had known the premises before the action) could not attend; the arbitrator, although one of these witnesses might have attended the first meeting, appointed a third meeting for the evening before he was about to leave London: on the morning of that day, defendant's attorney called on the arbitrator, and left an affidavit, stating that one of the two surveyors was confined to his bed, and the other had gone to France. The arbitrator suggested that other surveyors were equally capable of making an estimate, and offered, if the defendant's attorney would name a day, to come to London to hear them, or the two first proposed; the attorney refused to name a day, or to procure other surveyors. The arbitrator then gave the defendant's attorney notice that he should make his award if required by the plaintiff, and being required, awarded a sum to be paid to the plaintiff.

The defendant's attorney swearing he understood the arbitrator meant to have called another meeting, the Court set aside the award, though no objection was made to the amount awarded; leaving, however, the plaintiff at liberty to enforce the defendant's agreement to enter into the rule of *nisi prius* for reinstating the premises. *Dodington v. Hudson* . . . 655

— 2. Non-performance of award—Personal knowledge—Attachment.—Personal knowledge of an award and rule of court makes the party liable to an attachment for not performing the award, although he has not been personally served. *In re Bower* . . . 393

[And see *Hopcraft v. Fermor*, 654.]

— 3. Withdrawal of arbitrator from reference—Refusal of party to concur in appointment of another arbitrator.—In an action against several defendants a verdict was taken for the plaintiff for 400*l.* damages, subject to a point of law, reserved for the opinion of the Court; and in case that point should be determined in favour of the plaintiff, then subject to the award of a barrister as to the damages. The point of law having been decided in favour of the plaintiff, the arbitrator, who had previously advised one of the parties in the cause, declined to proceed in the reference. One of the defendants refused to name any other arbitrator. Under these circumstances the Court ordered judgment and execution to issue against that defendant for the damages found by the jury, unless he would consent to refer the damages to some other arbitrator. *Woolley v. Kelly* . . . 312

ASSIGNMENT—By husband of wife's reversionary interest in trust fund—Death of husband before interest reduced into possession. See Husband and Wife, 2.

ATTACHMENT—1. Failure to commence compliance with order of Court.—An attachment was issued against a defendant for not commencing within four days (at the end of which time the attachment was moved for) compliance with an order of Court, which it would have taken him three weeks to complete. *Dodington v. Hudson* . . . 681

— 2. Non-performance of award.—The Court will grant an attachment against a party for non-performance of an award which has been made a rule of Court, though he reside out of the jurisdiction of the Court. *Hopcraft v. Fermor* . . . 654

— 3. Personal knowledge of award—No personal service of writ. *Re Bower* . . . 393

BAILMENT—Duty of bailee to deal with goods according to contract.—Where an order is given, previously to the delivery of goods to a bailee, to deal with them, when delivered, in a particular manner, to which he assents, and afterwards the goods are delivered to him, a duty arises on his part, on the receipt of the goods, to deal with them according to the order previously given and assented to; and the law implies a promise by him to perform such duty. *Streeter v. Horlock* 579

BANKRUPTCY. See Appropriation; Distress; Trustees, 4.

BILL OF EXCHANGE AND PROMISSORY NOTE—1. **Indorsement by procuration.**—Where the declaration stated that a bill of exchange was indorsed by certain persons, trading under the firm of H. and F. by procuration of J. D.: Held, that this allegation was supported by evidence of J. D.'s handwriting, and that he, being the managing partner in a firm which carried on all business of buying and selling under the designation of H. & Co., was in the habit of indorsing bills in the manner above stated; although there was no such person as F. in the firm of H. & Co., and no direct proof that J. D.'s partners were privy to those transactions. *Williamson v. Johnson* 336

— 2. **Injunction to restrain negotiation.**—Holder for value with notice of defect in title.—Injunction granted *ex parte* to restrain the negotiation of a bill of exchange by a holder, who had given valuable consideration for it, but who had notice that it had been improperly accepted by a partner of the plaintiffs, in the partnership name. *Hood v. Aston*. 93

— 3. **Presentment.**—Notice of dishonour.—The plaintiffs sold goods to C. and P., and took their acceptance for the amount, half of which was guaranteed by the defendant. Before the bill became due, C. and P. became insolvent, of which the defendant was then informed, and he was also informed that the plaintiffs looked to him for the sum which he had guaranteed: Held, that, under these circumstances, it was unnecessary for the plaintiffs to present the bill when due, or give the defendant notice of the non-payment of it. *Holbrow v. Wilkins* 285

— 4. — **Waiver of notice by order not to pay.**—A declaration by payees against drawers of a bill of exchange averred presentment to and non-payment by drawers, neither of which averments was proved: Held, that notice to the drawers was waived by proof of an order given by the latter to the drawees, not to pay the bill if presented. *Hill v. Heap* 791

— 5. **Undertaking to accept.**—"Usual date."—A. and B., merchants in London, being applied to on behalf of C., resident at Demerara, to give him a letter of credit for 30,000*l.* to enable him to purchase and ship produce to London, and to accept his drafts at ninety days' sight on receiving invoice, bill of lading, and orders for insurance to the extent of certain fixed prices for various kinds of produce, wrote to C., stating that they consented to make the advances required upon the terms described; and that upon receiving the documents mentioned, and no irregularity appearing, they would accept his drafts at the "usual date" to the extent of 30,000*l.* C. shipped produce to the value of 800*l.* on board one vessel, and to the value of 1,800*l.* on board another, and sent the necessary documents to A. and B., and directed the surplus of the proceeds of the first cargo (after repaying the advances of A. and B.) should be paid to D. in London, and that the surplus of the second should be held by them to abide by his future advice. C. afterwards drew a bill upon A. and B. for 500*l.* at six months' sight, and did not specify to the account of which cargo it was to be charged. A. and B. refused to accept it, and C. having thereupon brought an action against them: Held, first, that C. was not bound to draw at ninety days, but might draw at any "usual date," and that six months could not be considered

unusual. Secondly, that C. was not bound to specify to which cargo the bill was to be charged; for that, in the absence of any direction by him, A. and B. might charge it to either at their election. *Laing v. Barclay* . 430

BILL OF EXCHANGE AND PROMISSORY NOTE—6. Stolen cheque—Holder for value—Negligence.—A tradesman having in the course of business received a banker's cheque, which had been stolen from the payee, and given the difference to a stranger who presented it in payment of an article purchased, brought assumpsit against the drawer for the amount: Held, in the absence of fraud and negligence on his part, that the action was maintainable. *Lee v. Newsum* 788

— 7. Promissory note—Notice of dishonour—Laches of holder. —Where the traveller of A., a tradesman, received in the course of business a promissory note, which he delivered to his master without indorsing it, and the note having been returned to A. dishonoured, the latter not knowing the address of the next preceding indorser, wrote to his traveller, who was then absent from home, to inquire respecting it: Held, that A. was not guilty of laches, although several days elapsed before he received an answer and gave notice to the next party, as he had used due diligence in ascertaining his address. *Baldwin v. Richardson* . . . 383

And see **Executor and Administrator, 4; Limitations, Statute of.**

BOND—Several bond—Removal of seal of one obligor avoidance as to others.—Debt on a bond, whereby Sir N. C., G. S. W., and J. W. acknowledged themselves held and bound to the plaintiffs in "1,000*l.* each, for which they bound themselves, and each of them for himself for the whole and entire sum of 1,000*l.* each," subject to a condition that G. B. M. should render a true account of all monies received by him as treasurer for the county of Middlesex: Held, that this was a several bond only, and that the obligees, by removing the seal of one obligor, did not render it void as to the others. *Collins v. Prosser* 540

And see **Executor and Administrator, 8.**

BOXING—Public exhibition of sparring matches held illegal. *Hunt v. Bell* 563

CARRIER. *See* **Bailment.**

CATTLE—Distress—Tender of amends.—An action on the case does not lie for detaining cattle distrained damage feasant where tender of sufficient amends was made after the cattle had been impounded. *Sheriff v. James* 647

CERTIORARI—Removal of indictment after judgment.—The Court will not grant a *certiorari* to remove an indictment from the Quarter Sessions after judgment has been pronounced in that Court. *Re v. The Inhabitants of Pennegoes and Machynlleth* 334

CHAMPERTY—Agreement to give creditor lien on securities in hands of another creditor.—Where a creditor who had instituted proceedings at law and in equity against his debtor enters into an agreement with the debtor to abandon those proceedings and give up his securities, in consideration of the debtor giving him a lien on securities in the hands of another creditor, with authority to sue such other creditor and agreeing to use his best endeavours to assist in adjusting his accounts with the holder of the securities, and in recovering his securities: Held, that the agreement does not amount to champerty, but would have done so if it had stipulated that the creditor should maintain the proceedings instituted by the debtor

against the holder of the securities, in consideration of the profits to be derived by the debtor from the suit. *Hartley v. Russell* . . . 196

CHARITABLE TRUST—1. **Account against corporation.**—Account of charity property decreed against a corporation from the time at which the accounts rendered by their answer commenced. *Attorney-General v. Corporation of Stafford* . . . 138

— 2. **Increase in value of lands conveyed in satisfaction of specific annual payment.**—A corporation, which was bound to pay out of the revenues of charity lands a certain annual sum to a college, in the year 1607 conveyed to the college lands then of that annual value, in satisfaction of the annual sum.

The lands so conveyed by accidental circumstances became of much greater value in proportion than the lands which were reserved by the corporation for the other purposes of the charity; yet the Court will not, at this day, undo an arrangement which was fair at the time, and had the approbation of the executor of the founder. *Attorney-General v. Pembroke Hall* . . . 244

— 3. **Irregularities in administration.**—A court of equity will not visit slight irregularities of trustees with severe censure, where they have not acted from corrupt motives. *Attorney-General v. Jolliffe* . . . 274

— 4. **Statutory funds applicable to public improvements.**—Where a common was inclosed under an Act of Parliament passed with the consent of the proprietors, and was vested in Commissioners, upon trust to apply the rents for the improvement of a town, with power to them to levy a rate on the inhabitants in case the rents proved deficient, an information and bill being filed by some of the inhabitants, on behalf of themselves and the others, against the Commissioners, for an account of the rents, alleging misapplication, and that a rate levied was unnecessary: Held, that the funds constituted a charity; and that the object of the suit being to avoid the rate, the plaintiffs had a right to sue on behalf of themselves and the other inhabitants.

Funds supplied from the gift of the Crown or of the Legislature, or of private persons, for any legal public or general purpose, are charitable funds, to be administered by courts of equity. *Attorney-General v. Heelis* . . . 153

— 5. **Transfer of stock bequeathed to charitable institution.**—A testator directed his executors to invest a sum of money in 3 per cent. stock, and bequeathed the stock to the treasurer of a charitable corporation in Scotland, in order that the dividends might be applied to the purposes of the charity. The Court ordered the stock to be transferred to the corporation. *Emery v. Hill* . . . 11

CHILD—Younger child. *See Settlement (Marriage).*

COMMON—Inclosure—Sufficiency of fence.—By an Inclosure Act it was enacted that the allotments in lieu of tithes should be enclosed and fenced on all such parts and sides as should not be directed to be fenced by any other proprietor, or as should not adjoin to any inclosed lands, or be bounded by any river or other sufficient fence in the judgment of the commissioners. A ditch, which had been immemorially the only boundary between the common and adjoining townships, is a "fence" within the meaning of the Act. *Ellis v. Arnison* . . . 314

COMPANY—1. **Action by individual shareholder against directors**—**Separate answers by directors.**—A bill being filed by a shareholder in a joint stock company against the directors and other shareholders, in order to have the partnership dissolved, and the proper accounts taken; and fourteen of the directors, who all appeared by the solicitor of the

company, having filed fourteen separate answers with long schedules to each, all of which answers and schedules were nearly *verbatim* the same: Held, that, in that state of the cause, no inquiry could be directed into the necessity or expediency of filing those separate answers with a view to the defence of the suit.

A public officer empowered to sue and be sued on behalf of a company does not represent the company for the purpose of internal litigation between the shareholders, and consequently a shareholder in a joint stock company cannot effectually sue such a public officer on behalf of himself and others of the shareholders for a dissolution of the concern. *Van Sandau v. Moore* 100

COMPANY—2. **Action by individual shareholder against directors**—**Agreement contrary to statutory powers of company.**—One of the shareholders of a canal is entitled to file a bill on behalf of himself and the other shareholders, to set aside an agreement made by the commissioners of the canal contrary to the provisions of the Act under which the canal was made; because whatever benefits may be reserved to the shareholders by the agreement, they must all be considered as being interested in having the directions of the Act complied with. *Gray v. Chaplin* . . . 207

CONTRACT—**Breach of—Liquidated damages.**—The defendant agreed to take an assignment of plaintiff's house and premises, without requiring lessor's title; that he would pay 2,300*l.* for it, and also the amount of goods, fixtures, and effects, and take possession of the house on or before September 29th; the plaintiff agreed to give up possession of the premises, effects, and stock by that day, to assign licences, to repair or allow for all damaged outside windows, and to clear rent, taxes, and outgoings to the day of quitting possession. The expenses of the agreement were to be paid by the parties in equal moieties; and either party not fulfilling all and every part, was to pay to the other 500*l.*, thereby settled and fixed as liquidated damages:

Held, that on breach of the agreement by omission to take an assignment, the defendant was liable to pay the whole 500*l.*; and that it was not a mere penalty to cover such damages as might be actually incurred. *Reilly v. Jones* . . . 640

And see **Sale of Goods; Vendor and Purchaser.**

CONVERSION—**Surplus of purchase-money under power of sale.**—Where a mortgage deed contains a power of sale, with a direction that the surplus produce shall be paid to the mortgagor, his executors and administrators, if a sale takes place in the lifetime of the mortgagor, the surplus is personal estate; but if after his death, it is real estate. *Wright v. Rose* . . . 209

COPYHOLD—1. **Custom of manor.**—In the manor of A. there is a custom that, when a copyhold tenement is granted by copy of court roll to any person to hold the same to *such person* for the lives of two or more other persons, and the life of the longest liver of such other persons *successively*, and the grantee dies during the life or lives of any one or more of such other persons, without having devised the said copyhold tenement, such other person or persons shall be entitled, by virtue of such grant, to take and hold the copyhold tenement *successively*, as they are respectively named in the grant, during his or their life or lives respectively; but if the grantee devises the copyhold tenement, the devisee shall take and hold it during the life or lives of the *cestui que vies*: Held, that this was a good custom. *Doe d. Nepean v. Goddard* . . . 494

—2. —**Fine.**—**Mandamus** to the lord and steward of a manor to hold a court, and accept a surrender of a piece of copyhold land from A. and his wife, and admit B. Return, that there is a custom within the manor, that if any person, not before being a customary tenant, or not being resident within the manor, takes any interest, as a purchaser

by surrender or otherwise, of any lands, &c. within the manor, he shall pay for his fine on admission, as he and the lord can agree, which is usually assessed at two years' value; but persons already being customary tenants or resident within the manor, pay another and a smaller fine to the lord upon so taking any such interest; that B., having purchased the equity of redemption of a customary estate of considerable value, afterwards, and before he was admitted to that estate, purchased the land in question, being a small customary estate, in order to be admitted to that first, and so elude the payment of the larger fine, whenever he should apply to be admitted to the larger estate, and by that means to defraud the lord of his fine. Upon exceptions: Held, that the return was bad, for that B. might lawfully make the second purchase in order to avail himself of the custom in favour of the tenants of the manor.

Semble, that if the second purchase were fraudulent, still the purchaser would be entitled to admittance, but would not be thereby enabled to avail himself of the custom. *R. v. Boughey* 516

COPYHOLD—3. Inclosure—Apportionment of allotments.—The lord of a manor being seised of it in fee, subject to an executory devise over, purchased an estate partly freehold and partly copyhold of the manor, and afterwards, under an Inclosure Act, carried in two claims, one in respect of the devised and the other in respect of the purchased estate, and obtained two allotments accordingly. He afterwards died, and the executory devise took effect: Held, that the copyhold part of the purchased estate, being extinguished in the manor, passed with it to the executory devisee, who was also entitled to so much of the allotment obtained in respect of the purchased estate as was proportionate to the value of the copyhold part: and it was referred to the Master to apportion the allotment accordingly. *King v. Moody* . . . 267

COPYRIGHT—1. Piracy—Injunction.—Where there is a reasonable doubt whether the law would give damages for the piracy of a work, a court of equity will not maintain an injunction granted *ex parte*, but will leave the plaintiff to establish his legal right, before it interferes on his behalf. *Lord Byron v. Dugdale* 282

— 2. **Article substantially copied from published work.**—Copyright may be either in respect of the matter or the arrangement; but no property can be acquired in an article copied from a prior work. *Barfield v. Nicholson* 144

— 3. **Publication by rival publisher of similar work by same author.**—An author having sold the copyright of a work published under his own name, and covenanted with the purchaser not to publish any other work to prejudice the sale of it, another publisher, who had no notice of this covenant, will be restrained from publishing a work subsequently purchased by him from the same author, and published under his name, on the same subject, but under a different title, though there be no piracy of the first work. *Barfield v. Nicholson* 144

CORPORATION (MUNICIPAL)—1. Election of mayor—Mode of election.—Where a charter directed that out of certain persons to be nominated in a particular mode, "the mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants of the borough for the time being, (they being for that purpose congregated and assembled together,) or the greater part of them as should be so congregated, might, by the greater part of the voices of them so assembled, choose one to be mayor:" Held, that a majority of each definite body must be present in order to make a valid election. *R. v. Bower* 476

— 2. **Election of burgesses.**—Where the charter of a corporation (having a certain definite number of capital burgesses) provided that, "when any one or more of the capital burgesses for the time being should

die, or dwell without the borough, or be removed from his office, it should be lawful to the other capital burgesses 'at that time surviving and remaining, or the greater part of the same,' of whom the mayor was to be one, to elect another, or others of the burgesses of the said borough, into the place or places of the capital burgess or burgesses so happening to die, &c. : Held, that a majority of the entire body of capital burgesses, and not merely of those then existing, must be present to make a good election under that clause. *R. v. Devonshire* 523

CORPORATION (MUNICIPAL)—3. Inspection of charters—**Mandamus**.—A *mandamus* lies to compel a mayor and corporation to allow the burgesses, at all seasonable times, to inspect all the charters and grants made to the borough. *Ex parte The Mayor and Aldermen of Stafford* 558

— 4. Liability of corporation for poor rate. See **Poor Law**, 4.

And see **Charitable Trust**, 1.

COSTS. See **Executor and Administrator**, 2; **Practice**, 1—4; **Solicitor and Client**, 2—5; **Vendor and Purchaser**, 12.

COVENANT—For title—**Breach of**.—Covenant to save harmless certain premises against all actions, suits, claims, and demands whatsoever, both in law and equity, which might be made, commenced, or prosecuted by H. W. P., or T. B. W. P. Breaches. 1st, That H. W. P. on, &c. at, &c. who then and there made a claim and demand, and claimed to have a right and title to the premises, entered and cut trees, &c. and procured the occupier to attorn to him. 2ndly, That certain title-deeds relating to the premises were withholden by one A. W. at the instance, and through the claim and demand of T. B. W. P. Plea to 1st breach, that H. W. P. had no lawful claim or title to the premises; to 2nd breach, similar plea as to T. B. W. P. Demurrer and joinder: Held, first, that H. W. P. and T. B. W. P. being named in the covenant, the indemnity extended to all claims made by them, whether upon lawful title or otherwise; and, secondly, that the acts upon which the breaches were assigned were claims in law within the meaning of the covenant. *Fowle v. Welsh* 291

And see **Apprentice**; **Landlord and Tenant**, 2—4; **Partnership**, 2.

CRIMINAL LAW—1. Right of prisoner to be represented by solicitor at magisterial proceedings.—A prisoner, when examined before magistrates under a charge of felony, is not entitled as of right to have a person skilled in the law present as an advocate on his behalf, it being a preliminary investigation only, and not conclusive upon him. *Cox v. Coleridge* 298

— 2. Indictable offence—Keeping "common gaming-house." See **Gaming**.

— 3. Compounding felony—Return of money paid. See **Money Paid**.

— 4. Arson. See **Insurance (Fire)**.

And see **Habeas Corpus**.

CUSTOM—Of manor. See **Copyhold**, 1, 2.

DAMAGES—"Liquidated damages." See **Contract**.

DEBT—Release of. See **Advancement**.

DEEDS—Production of. See **Vendor and Purchaser**, 8.

DEFAMATION—1. Abuse of public officer—Criminal information for libel.—The Court of King's Bench will grant a criminal information against a person who abuses a public officer for the manner of discharging his duty. *R. v. Smith* 557

DEFAMATION—2. Actionable words written of person in way of illegal calling.—In an action for libelling the plaintiff in his vocation as an exhibitor of sparring matches, the jury were directed to consider whether the plaintiff's exhibitions were not illegal, as tending to form prize-fighters. Such was the opinion of the Judge, who recommended the jury to find a verdict for the plaintiff, in order that the question might be fully discussed on a motion to set aside the verdict; a verdict having been found for the defendant, the Court refused to grant a new trial.

A party who pursues an illegal vocation has no remedy by action for a libel regarding his conduct in such vocation. *Hunt v. Bell* 563

— **3. Blasphemous libel.**—A publication stating Jesus Christ to be an impostor and a murderer in principle is a libel at common law. *R. v. Waddington* 283

— **4. Justification—Pleading.**—Where justification is pleaded to an action for defamation, it is sufficient to justify the substance of the defamatory statement. *Edwards v. Bell* 659

— **5. Justification—General plea of bad character.**—In declarations in actions for libel no unnecessary averment should be introduced, and regard should be had, in drawing such declarations, to the libel itself, which is now admissible as proof of all that is positively averred therein.

Pleas by way of justification, generally aspersing the character of the plaintiff by averments, without stating particular acts of bad conduct apposite to the justification of the defendants, are not only demurrable, but ought to be demurred to, as due to the Court and to the Judge before whom the action may be tried.

It is an erroneous notion that by demurring to a plea of justification the plaintiff necessarily admits the truth of the statements in a libel. That which is well pleaded only is admitted. *Jones v. Stevens* 714

— **6. Evidence of averments.**—It is not necessary to give evidence to prove the truth of averments, in a declaration in an action for libel, according with statements in the publication. *Bagnall v. Underwood* . 766

— **7. Evidence in mitigation of damages.**—In an action for a libel, evidence of facts, tending but not amounting to a justification, cannot be received in mitigation of damages under the general issue. *Waithman v. Weaver* 770

DISTRESS—For taxes—Heirlooms.—A testator being seised of the mansion-house of B. for his life, and being the owner of certain household furniture, pictures, &c., therein, bequeathed the latter to trustees upon trust, to permit the same to be held and enjoyed by the person who, for the time being, would be entitled to the possession of his freehold estates; and he further directed, that whilst the freehold estates should be held and enjoyed by the person entitled to the mansion-house, the chattels should be kept in the mansion-house, and not removed therefrom, unless with the consent of the trustees. Upon the death of the testator, the goods and chattels were in the mansion-house, and his son then became seised of the freehold estates, and entitled to the mansion-house for his life, and occupied it, with the household furniture, &c. mentioned in the will: Held, that even if the son of the testator had been a trader, and become bankrupt, and had had the goods in his possession at the time of the act of bankruptcy, under the above circumstances they would not have passed to his assignees as property in his order and disposition within the meaning of the Bankruptcy Act, and that a collector of taxes was not justified in distraining these goods for taxes due from the son in respect of horses, carriages, dogs, &c. under the 43 Geo. III. c. 99, s. 38 [see now 43 & 44 Vict. c. 19, s. 4], by which collectors of taxes are authorised to use all remedies and powers which, by any Acts concerning bankrupts, are given to creditors. *Quære.* Whether that section

applies to persons not subject to the bankrupt laws. *Earl of Shaftesbury v. Russell* 534
And see Cattle.

ELECTION—Of mayor and burgesses. *See Corporation*, 1, 2.

ESTATE—Of trustees. *See Will*, 15.

ESTOPPEL.—A statement of fact contained in a conveyance by lease and release may operate as an estoppel; and, in equity, the burden of such estoppel runs with the land. *Bensley v. Burdon* 258

EVIDENCE—1. **Steward—Confidential communication**.—A steward may be examined as a witness to give evidence of the existence and contents of a particular document, if due notice have been given to produce it specifically.

A steward is not, like the legal adviser of a party, a privileged person protected by his relative situation from disclosure of his knowledge of his employer's affairs, and the existence and contents of muniments, on the ground of the necessary confidence unavoidably reposed in him, and the immediate communication between them, as analogous with the relation of solicitor and client. *E. of Falmouth v. Moss* 753

— 2. **Of plaintiff being a solicitor**.—In an action for a libel on the plaintiff, tending to injure his credit and reputation in his profession and business of an attorney, and defamatory of him in his profession and business, it was held to be sufficient evidence of the plaintiff being an attorney, that it was proved by the book of admissions produced by the proper officer, and that he practised as an attorney. *Jones v. Stevens* 714

— 3. **General evidence of bad character in action for libel**.—General evidence of the plaintiff's bad character and ill repute in his business as a practising attorney cannot be admitted either to contradict the allegation in the declaration, that the plaintiff during, &c. exercised and carried on the business of an attorney, with great credit and reputation, with a view to mitigating damages on the general issue, or in support of averments in the defendant's pleas pleaded by way of justification that the plaintiff was a disreputable professor and practitioner in the law. *Ibid.*

— 4. **Of wife against husband**.—Where the wife served in her husband's shop, and carried on the business in his absence: Held, that admissions made by her on application to pay for goods before delivered at the shop, were receivable in evidence against her husband. *Clifford v. Burton* 614

— 5. **Printed copy of foreign code**.—A printed copy of the "Cinq Codes" of France, produced by the French vice-consul, resident in London, purchased by him at a bookseller's shop at Paris, received as evidence of the law of France, upon which the Court would act. *Lacon v. Hughes* . . 779

— 6. **Certificate of Lloyd's agent**. *See Insurance (Marine)*, 2.

— 7. **Of averments in action for libel**. *See Defamation*, 6.

— 8. **In mitigation of damages**. *See Defamation*, 7.

EXECUTOR AND ADMINISTRATOR—1. **Administration—Costs of debtor—Set-off against debt**.—In a suit for the administration of assets, a debtor to the estate, who is entitled to have his costs of suit out of the fund, will not be allowed to receive payment of them while his debt continues unsatisfied; but the costs due to him will be set off *pro tanto* against the debt due from him. *Harmer v. Harris* 20

— 2. **Executor's costs—Solicitor acting also for other parties**.—Where the same solicitor acts for an executor and other co-defendants, the

estate will be charged, in respect of the executor's costs, only with that proportion of the sum due to the solicitor from his clients, which the executor, as between himself and the co-defendants, ought to bear. *Ibid.*

EXECUTOR AND ADMINISTRATOR—3. Grant of administration to surviving partners.—Where a partner dies intestate leaving the partnership accounts unsettled, the Court will grant administration of his effects to the surviving partners, or any persons claiming under them, if the next-of-kin decline it. *Cawthorn v. Chalié* 174

— 4. Right of administrator *de bonis non* to sue upon bill.—Where a bill of exchange was indorsed generally, but delivered to S. C. as administratrix of J. C., for a debt due to the intestate, and S. C. died intestate after the bill became due, and before it was paid: Held, that the administrators *de bonis non* of J. C. might sue upon the bill; and that their title was sufficiently proved by the letters of administration *de bonis non*, without producing those granted to S. C., the administratrix. *Catherwood v. Chabaud* 339

— 5. Agreement to give mortgage to residuary legatee—Delivery of title deeds by executors to agent to enable him to prepare mortgage—Equitable lien.—Executors, who are also trustees, agree to give one of the residuary legatees, as a security for his share, a legal mortgage of real estate, part of the testator's assets, and, for the purpose of having the mortgage prepared, they deliver the title-deeds to the legatee's agents: this gives him an equitable lien on the property, as against the executors, though not as against the other residuary legatees. *Hockley v. Bantock* 16

— 6. English executor—Application to appoint receiver of property in India.—The Court will appoint a receiver in India of a testator's assets on the application of an executor resident in England, but the receiver must give sureties resident in England. *Cockburn v. Raphael* 244

— 7. Payment of debt after order for account.—An executor or administrator may, after a suit is instituted against him for an account, pay any simple contract or specialty creditor, and will be allowed such payment in passing his accounts. *Maltby v. Russell* 191

— 8. Retainer by heir.—The heir of the obligor in a bond, being one of two surviving executors of the obligee, is entitled to retain the amount of the bond out of the produce of the estate descended to him. But if, in a suit instituted by creditors, he accounts for the produce of the real estate in the Master's office, and he and his co-executor prove the bond debt under the decree, he is not entitled to retain. *Player v. Foxhall* 133

— 9. Power to sell—Sale by acting executors to one who has renounced.—A., by will, directed his real and personal estate to be sold, the produce to be invested for his son and daughter, and two others. Directions were given as to succession in cases of death without issue; and if all the legatees should die under age, and without issue, the property was to go over to B. C., D., and E., and their heirs; which four persons A. appointed as his executors, "to see that everything was duly performed according to his will;" he also appointed F. and G. as executors, "in addition to the above persons, for which he requested those two friends would accept of 50*l.* each;" he also requested F. and G. to act as guardians, in conjunction with B., C., D., and E., for the care of the persons and property of the legatees. The will was duly attested, but there was an unattested codicil, that if either of the executors should refuse to accept the trust and act as executor, the bequest of property to every such person was totally annulled.

The testator died, and the will was proved by B., C., and D. only, E., F., and G. having renounced. Part of the real estate having been put up to

sale in four lots, was purchased by G., who afterwards refused to complete his purchase, and a suit was instituted in Chancery. That Court decreed that the codicil was not to be considered as part of the will with reference to the real estate, but that the rest of the will ought to be established, and the trusts performed; and upon reference to the Master, it was found that the contract of purchase entered into by G. was for the benefit of the legatees, who were infants.

Lot 1 was then conveyed by lease and appointment and re-lease from B., C., D., E., F., and G. to T., in consideration of 2,000*l*. Lot 2, by lease and appointment, and re-lease from B., C., and D. to T. for 2,300*l*. (T. declaring by another deed, that the consideration-money mentioned in the two first deeds belonged to G.; that the name of T. was only used as a trustee, and that T. stood seised of the premises in trust for G.), Lot 3, by lease and appointment and re-lease, from B., C., and D. to G., to the use of G. for 4,000*l*. Lot 4, by lease and appointment, and re-lease, from B., C., D., E., F., and G. to G., to the use of G. for 360*l*. : Held, that by these conveyances the legal estate in Lots 1 and 2 was well vested in T., and the legal estate in Lots 3 and 4 in G. *Mackintosh v. Barber* . . . 590

EXECUTOR AND ADMINISTRATOR—10. **Employment of trust money in business—Interest.**—An executor, being a trader, who, after paying pecuniary legacies in due time, retains for many years balances belonging to the residue, and mixes them with his own monies, will be charged with interest at 5*l*. per cent., though it could not be ascertained, without a decree of the Court, who were the persons entitled to the fund. *Sutton v. Sharp* . . . 19

— 11. **Use of intestate's stock in business.**—A defendant having stated in his answer that, by carrying on business on a farm, and with stock belonging to the assets of an intestate, he had made profit, but that, as he had not kept any accounts, and had blended the transactions of the farm with his other concerns, he could not set forth the amount of the profits; it was ordered that, in taking the account against him, annual rests should be made, and interest calculated at 5 per cent. upon those annual rests. *Walker v. Woodward* . . . 9

— 12. **Neglect to invest trust funds.**—Trustees and executors under the will of a testator, who had directed them to invest a share of his residuary estate either in the public funds or on mortgage at 5 per cent., admitted by their answer that they had, from time to time, balances in their hands, and it was proved that, many years after the death of the testator, they had not invested the share either in the funds or on mortgage; inquiries were directed at the original hearing concerning the balances retained by them, and the prices of 3 per cent. stock at the several times when such balances were in their hands. *Hockley v. Bantock* . . . 16

FISHERY—Several right of fishery—Reservoir made under statutory powers—Provision for periodical exhaustion.—Where under an Act of Parliament, a canal reservoir was made over lands in which A. and B. had separate interests, and the Act provided "that it should be lawful for the owner or owners of the lands on which any such reservoir should be made to let all the water out of such reservoir once in seven years, for the purpose of taking the fish therein:" Held, that A. and B. were not tenants in common of this septennial fishery. *Snape v. Dobbs* . . . 616

FRAUD—Constructive fraud—Lease to steward—Acquiescence.—Bill to set aside the lease of a farm granted to a steward by his employer, dismissed, with costs; it appearing that the rent to be paid by the steward had been fixed by a surveyor named for that purpose by the employer, and on a valuation made in the manner usual with that surveyor; and the offer

of a higher rent being known to the employer before he executed the lease.
Lord Selsey v. Rhoades 150

And see *Sale of Goods*, 1.

GAMING—Keeping a “common gaming-house”—*Rouge et Noir*—Indictment.—The keeping of a common gaming-house, and for lucre and gain, unlawfully causing and procuring divers idle and evil-disposed persons to frequent and come to play together at a game called “*Rouge et Noir*,” and permitting the said idle and evil-disposed persons to remain playing at the said game for divers large and excessive sums of money, is an indictable offence at common law.

Semble. That an indictment would be good merely charging the defendant with keeping a common gaming-house. Per *HOLROYD, J. R. v. Rogier*
 393

GOODS—Deposit in warehouse—Liability to distraint for rent of warehouse. See *Landlord and Tenant*, 8.

GOODS, Sale of. See *Sale of Goods*.

GUARDIAN. See *Infant*, 1, 2.

HABEAS CORPUS—Return to writ—Prisoners in custody on reasonable suspicion of criminal offence.—Where persons detained without any warrant on board one of his Majesty's ships of war, on a charge of smuggling, and on suspicion of murder, were brought up by writs of *habeas corpus*, and it appeared by the return to those writs, and to a *certiorari* which issued at the same time, that the prisoners might be guilty of the offences imputed to them, the Court refused to discharge them out of custody, and committed them to the custody of the marshal in order that they might be taken before some competent authority to be examined touching the matters contained in the returns, and to be further dealt with according to law.
Ex parte Krans 389

HIGHWAY—Order for diversion of—Informality.—An order of justices for diverting a highway stated that the new road was to pass through the lands of the late T. J., and that the justices had received evidence of the consent of the said T. J. in his lifetime: Held, that this order was bad, because it did not thereby appear that T. J. was the owner of the estate at the time when the order was made. *R. v. Kirk* 286

HORSE—Warranty.—“To be sold, a black gelding, five years old; has been constantly driven in the plough.—Warranted”: Held, that the warranty applied to soundness only. *Richardson v. Brown* 648

HUSBAND AND WIFE—1. Ante-nuptial settlement by wife in fraud of marital right.—A woman, ten months before her marriage, but after the commencement of that intimate acquaintance with her future husband which ended in marriage, made a settlement of a sum of money which he did not know her to be possessed of; the marriage took place, she concealing from him both her right to the money and the existence of the settlement: ten years afterwards she died and, after her death, he filed a bill to have the money paid to him: Held, that the settlement was void, as being a fraud on his marital right. *Goddard v. Snow* 111

— 2. Assignment by husband of wife's reversionary interest in trust fund.—A married woman whose reversionary interest in a trust fund has been assigned by her husband to a purchaser for valuable consideration is entitled to claim the fund against the assignee, if her husband dies before the interest has been reduced into possession. *Purdew v. Jackson* 1

HUSBAND AND WIFE—3. Mortgage of wife's estates—Wife's right to redeem.—A husband and wife mortgaged the wife's freeholds for 1,000 years, reserving the power to redeem to them, or either of them, and covenanted to levy a fine to the mortgagee for the term, and, subject thereto, to the husband in fee: they also surrendered the wife's copyholds to the mortgagee in fee, reserving the power to redeem to the husband and his heirs; the husband afterwards released his equity of redemption as to both estates to the mortgagee in fee: the mortgagee entered into possession, and the husband afterwards died: Held, that the wife was entitled to redeem the copyholds, but not the freeholds. *Reeve v. Hicks* 241

And see Evidence, 4.

INCLOSURE. *See Common; Copyhold, 3.*

INFANT—1. Guardian.—If two persons are appointed by the Court guardians of an infant during his minority, or until further order, the guardianship is at an end on the death of one of them, and there must be a new appointment. *Bradshaw v. Bradshaw* 127

— **2. Expenditure by guardian—Ratification.**—Expenditure by a guardian during minority ratified by subsequent adoption. *Newham v. Newham* 272

— **3. Maintenance.**—Where there are several funds provided by different persons for the maintenance of infants, the interest of the infants must alone determine which of the funds is first applicable. *Foljambe v. Willoughby* 178

— **4. Suing by next friend—Security for costs.** *See Practice, 4.*

INJUNCTION. *See Bill of Exchange, 2; Copyright.*

INSURANCE (FIRE)—Charge of arson against plaintiff.—In an action against an insurance company to recover a loss by fire, the defence being that the plaintiff himself had wilfully set fire to the premises, the Judge directed the jury, that in order to their finding a verdict against the plaintiff, they ought to be satisfied that the crime imputed to him was as fully proved as would justify them in finding him guilty on a criminal charge for the same offence: Held, that this direction was right.

In the same cause the Court refused to grant a rule *nisi* for a new trial on the ground that subsequently to a verdict for the plaintiff, the grand jury had found a bill against him and others for a conspiracy to defraud the insurance company in this very matter.

But on affidavits disclosing the conspiracy itself, and shewing that the defendant had no knowledge of it till after the trial, so that the plaintiff's case was in effect a surprise on him, the Court granted a rule *nisi* for a new trial, on payment of costs. *Thurtell v. Beaumont* 644

INSURANCE (MARINE)—1. Licence to trade.—A misdescription of the person to whom a licence from the Crown is granted to trade with the enemy, does not invalidate the licence. *Lemcke v. Vaughan* 682

— **2. Proof of damage to goods—Certificate of Lloyd's Agent.**—In an action against an underwriter upon goods which sustained sea-damage: Held that although the defendant was a subscriber to Lloyd's, a certificate granted by their agent, resident abroad, was not admissible to prove the amount of the damage. *Drake v. Marryat* 464

— **3. Sale of ship by master to avoid cost of heavy repairs—Urgent necessity.**—Where a ship was so shattered in a storm that upon survey it was found the expense of repairing her would far exceed her original value, and the captain, having sold her *bond fide* for the benefit of

all concerned, the purchaser shortly afterwards broke her up: Held, that this was such an urgent necessity as justified the sale. *Robertson v. Clarke* 676

INSURANCE (MARINE)—4. Usage in adjusting loss.—The general principle of insurance, that the insured shall, in case of a loss, recover no more than an indemnity, may be controlled by a mercantile usage clearly established to the contrary: and usage, that the loss in an open policy on freight shall be adjusted on the gross, and not on the net amount of the freight, is a legal usage. *DALLAS, Ch. J. dubitante. Palmer v. Blackburn* 599

INTEREST—On legacy. See Will, 12.

And see Executor and Administrator, 10—12.

JURISDICTION—Of superior courts.—A statute enacted, “that if any question or difference shall arise upon taking any distress, the same shall be determined by the commissioners of taxes:” Held, that as the jurisdiction of the superior courts was not expressly taken away, an action at common law was maintainable for a wrongful distress. *Earl of Shaftesbury v. Russell* 534

LANDLORD AND TENANT — Attornment — Estoppel — 1. Avowries, first, by W. and T. for rent due to W. and T. from plaintiff, as tenant to W. and T.; secondly by W. and T., and his wife, in right of his wife, for rent due to W. and T. and his wife, in right of his wife, from plaintiff, as tenant to W. and T. and his wife, in right of his wife; were holden to be supported by evidence of an attornment from plaintiff to W. and T. and his wife. *Gravenor v. Woodhouse* 582

— 2. Breach of covenant—Suit in nature of rent—Covenant running with land.—A. being seised in fee of a mill and of certain lands, granted a lease of the latter for years, the lessee yielding and paying to the lessor, his heirs and assigns, certain rents, and doing certain suits and services; and also doing suit to the mill of the lessor, his heirs and assigns, by grinding all such corn there as should grow upon the demised premises. The lessor afterwards devised the mill and the reversion of the demised premises to the same person: Held, that the reservation of the suit to the mill was in the nature of a rent, and that the implied covenant to render it resulting from the reddendum, was a covenant that run with the land as long as the ownership of the mill and the demised premises belonged to the same person, and consequently that the assignee of the lessor might take advantage of it. *Vyvyan v. Arthur* 437

— 3. — Offensive or annoying trade—Public-house.—A lessee covenanted that he would not do any act, matter, or thing upon the demised premises, which might be, grow, or lead to the damage, annoyance, or disturbance of the lessor, or any of his tenants, or to any part of the neighbourhood; and the proviso for re-entry was, that the lessee should not permit any person to inhabit the premises who should carry on certain specified trades or businesses, (that of a licensed victualler not being one of those,) or any other business that might be, or grow, or lead to be offensive, or any annoyance or disturbance to any of the lessor's tenants: Held, that the opening of a public-house upon the premises was not a breach of the covenant or proviso. *Jones v. Thorne* 546

— 4. — Covenant for quiet enjoyment—Eviction by superior lessor.—Covenant by the lessor that the lessee should hold the premises without any lawful let, suit, interruption, eviction by the lessor, or by or through the lessor's acts, means, right, &c. The lessor held, under a lease, for a longer term, which contained a clause of re-entry by the original lessor in case the premises should be used for a shop. The under-lessee

was not informed of this clause, and underlet to a tenant, who incurred a forfeiture by using the premises for a shop; and the original lessor evicted him: Held, that this was not an eviction by means of the lessor within the meaning of the covenant in the underlease. *Spencer v. Marriott* . . . 453

LANDLORD AND TENANT—5. Demand of rent.—Demand of rent due from lessee to lessor, though made of a stranger, if made upon the land, is a sufficient demand, and need not be general, to sustain ejectment for a forfeiture for non-payment of rent being lawfully demanded. *Doe d. Brook v. Brydges* . . . 552

— **6. Glebe—Lease by incumbent—Waste land leased for first time—13 Eliz. c. 10.**—Waste land belonging to a vicarage, which land had remained unclosed and useless from the inability of the vicars to incur the expense of enclosure, was let (having never been let before), by the incumbent (with the confirmation of patron and ordinary), to C. A. P. for three lives; C. A. P. undertaking to reclaim the land, and to pay a rack rent which was the most that could be obtained: Held, that this lease was not binding on the incumbent's successor. *Doe dem. Tennyson v. Lord Yarborough* . . . 575

— **7. Distraint for Rent—Distraint after tender.**—Where the goods of A. were distrained for rent in arrear after the amount had been tendered: Held, that A. might bring an action on the case for an excessive distress. *Branscomb v. Bridges* . . . 335

— **8. Goods deposited in warehouse.**—Goods landed at a wharf, and deposited by a factor to whom they were consigned in a warehouse on the wharf till an opportunity for sale should present itself, are not distrainable for rent due in respect of the wharf and warehouse. *Thompson v. Mashiter* . . . 624

— **9. Impeachment of landlord's title.**—A. hired apartments by the year of B.; B. afterwards let the entire house to C., who sued A. in an action for use and occupation for the hire of the apartments: Held, that, as A. could not impeach B.'s title, neither could he impeach that of C. *Rennie v. Robinson* . . . 604

— **10. Acquiescence of landlord in adverse title.**—In 1784, a tenant for life, who had a power to lease for twenty-one years, leased for fifty-three years to defendant, who, in 1813, (nine years after the death of tenant for life,) underlet to plaintiff: ten years after the death of tenant for life, the remainderman, after giving to plaintiff and defendant notice to quit, granted plaintiff a new lease, and received the rent thereon for six years; at the end of which time defendant, who had acquiesced in the transaction, during the interval, distrained on plaintiff for six years' rent: Held, that after this acquiescence, plaintiff might, in an action of replevin, plead *non tenuit* to defendant's avowry under the lease which plaintiff accepted from him in 1813. *Neave v. Moss* . . . 650

— **11. Reversioner.**—A tenant may shew his landlord's title at an end in ejectment brought against him by the landlord; but an occupier who has paid rent to a tenant for life under a settlement cannot in an ejectment by the reversioner after the death of the tenant for life dispute the plaintiff's title. *Doe d. Colemere v. Whitroe* . . . 769

— **12. Forcible entry by landlord after expiration of term—Trespass.**—A tenant having omitted to deliver up possession when his term had expired after a regular notice to quit, the landlord, in his absence, broke open the door, and resumed possession; though some articles of furniture remained.

The tenant having obtained a verdict against the landlord in trespass for this entry, the Court granted a new trial, holding that the landlord might so enter in such case. *Turner v. Meymott* . . . 612

— **13. Leases granted under statutory power—Second lease not**

taking effect immediately after expiration of subsisting lease.—By Act of Parliament a tenant for life was empowered to grant leases for any term not exceeding ninety-nine years, so as every such lease or leases be made to take effect either in possession, or immediately after the determination of the leases then subsisting, and so as in every lease there be reserved, payable during the continuance of the term and estate thereby granted, the best and most beneficial yearly rent or rents. Part of the estate being let upon leases which, in due course, would expire on the 10th Oct. 1791, the tenant for life, in consequence of one bargain, executed at the same time two leases of that part of the estate, one bearing date the 4th May, 1787, for the term of thirty years, to commence on the 10th Oct. 1791, and the other bearing date 4th June, 1787, for the term of sixty-three years, to commence 10th Oct. 1821: Held, that this latter lease was void, as it was not to take effect immediately after the determination of the subsisting lease (now 12 & 13 Vict. c. 26, s. 4).

The first of these two leases reserved a rent of 270*l.*, the second reserved only 120*l.* By a clause in the second lease the tenant was bound to rebuild either before the expiration of the term granted by the first lease, or within the first year of the term granted by the second. *Semble*. That although the rents reserved by the two leases might be the most beneficial as between the lessor and lessee, yet they were not so between the tenant for life and the reversioner, and that, upon that account also, the second lease was void. *Doe d. Sutton v. Harvey* 444

LIEN—1. Equitable. *See* Executor and Administrator, 5.

— 2. Of agent on life policy for general advances to principal. *See* Principal and Agent, 1.

LIMITATIONS, STATUTE OF—1. Acknowledgment in general terms.—In an action on a promissory note, the defendant having pleaded the Statute of Limitations, the plaintiff gave in evidence, as proof of an acknowledgment within six years, the following letter from the defendant to the plaintiff: "Business calls me to Liverpool. Should I be fortunate in my adventures, you may depend on seeing me in Bristol; otherwise, I must arrange matters with you as circumstances will permit." The defendant did not shew that there were any other matters besides the promissory note to which the letter could refer: Held, that it was properly left to the jury to decide whether this letter referred to the matter of the promissory note, and was a sufficient acknowledgment to take the case out of the statute. *Frost v. Bengough* 621

— 2. Promise by one joint debtor made after the marriage of the other.—Where an action was brought against A. and B., and C. his wife, upon a joint promissory note, made by A. and C. before her marriage, and the promise was laid by A. and C. before her marriage, and defendants pleaded the Statute of Limitations, whereupon issue was joined: Held, that an acknowledgment of the note by A. within six years, but after the intermarriage of B. and C., was not evidence to support the issue. *Pittam v. Foster* 385

MAGISTRATE. *See* Mandamus.

MANDAMUS—To compel act of doubtful validity.—The Court of K. B. will not grant a *mandamus* commanding justices of the peace to do an act of which the validity is doubtful. *R. v. Dayrell* 473

And see Copyhold; Sea-wall.

MANOR—1. Claim for tolls. *See* Market.

— 2. Custom of. *See* Copyhold, 1, 2.

MARKET—Claim of toll traverse—Prescription.—In an action of trespass the lord of a manor set out various burthens borne by him, and then prescribed, not by reason of those burthens, but generally as lord of the manor, for a toll upon all goods bought and delivered, or bought elsewhere and brought into and delivered, in a town within the manor, which from time immemorial had been parcel of the manor: Held, after verdict, that this was good as a claim of toll traverse, although the burthens set out did not constitute a sufficient consideration for a toll thorough.

Where a legal commencement of a prescription can be presumed, that, after verdict, is sufficient to support the claim. *Richards v. Bennett* . 372

MARRIAGE—Validity—*Lex loci*.—The validity of a marriage celebrated in a foreign country must be determined in an English Court by the *lex loci*, where the marriage is solemnized.

On a plea of coverture, where the parties, who were British subjects, were married in France: Held, that if the marriage would not be valid in that country, it would not be valid in this. *Lacon v. Higgins* . . . 779

MASTER AND SERVANT. See Apprentice; Ship.

MONEY PAID—Return of money given to stifle prosecution.—A. being committed for a forgery, the prosecutor called on him in prison, and said he had no wish to appear against A., but that the attorney concerned (an attorney of this Court) would proceed unless his costs, which the prosecutor had no means of paying, were paid; he then proposed that A. should advance the money; A. did so, and it got into the hands of the prosecutor's attorney; notwithstanding this, A. was put on his trial, and the prosecutor appeared against him; A., however, being acquitted, applied to this Court to compel the prosecutor's attorney to refund the money, putting in an affidavit of his innocence of the offence charged on him, and that he paid the money because, from his knowledge of the parties, he believed his life in danger. The Court refused to interfere. *Ex parte Brookes* . 603

MORTGAGE—1. Constructive notice of settlement—Limited search of register.—Where it appears that an incumbrancer on an estate in Yorkshire searched the register from a certain date only, it will not be presumed that he had notice of any of the contents prior to that date. *Hodgson v. Dean* . . . 188

— 2. Discharge of incumbrance by tenant for life.—If a tenant of an estate, subject to an executory devise, pays off a charge upon the estate, and the executory devise afterwards takes effect, his executors will be entitled to be repaid the amount of the charge. *Drinkwater v. Combe* 210

— 3. Discharge by and transfer to remainderman.—A tenant in tail in remainder (after estates to A. for life, and to his first and other sons in tail) pays off a mortgage during the life of the tenant for life, takes an assignment to himself of the mortgage term, and afterwards comes into possession of the estate, and dies without issue: the mortgage is a subsisting charge for the benefit of his personal estate, there being no act to shew a contrary intention. *Wigsell v. Wigsell*. . . 224

— 4. Mortgagee in possession—Account—Compound interest.—After the time is ascertained at which the mortgage debt of a mortgagee in possession was paid off, annual rests from that date will be made in the accounts against him, though rests were not directed by the previous orders and decrees under which those accounts were taken.

Annual rests are directed in an account of occupation rent as well as in an account of rents and profits received. *Wilson v. Metcalfe* . . 128

And see Husband and Wife, 3; Conversion.

MORTMAIN. *See* Will, 17.

MUNICIPAL CORPORATION. *See* Corporation.

NEGLIGENCE—1. **Rule of the road.**—In case, for negligent driving, the law or usage of the road is not the sole criterion of negligence. Therefore where defendant's carriage was on the wrong side of the road, and in attempting to pass on the near instead of the off side, plaintiff sustained damage: Held, that it was for the jury to decide the question of negligence on all the circumstances of the case. *Wayde v. Lady Carr* . . . 554

— 2. **Surgeon—Unskilful treatment—Averment of hire.**—It is not a ground of demurrer to a declaration in an action on the case by a man and his wife against a surgeon for an injury to the wife by reason of the defendant's improper and unskilful treatment, that it is not stated in the averment that the defendant was retained and employed as surgeon for reward, by whom he was so retained, or by whom he was to be paid. Nor that it is not stated that the defendant undertook, &c. properly or skilfully to conduct himself in and about, &c.

It is sufficient to aver that the defendant was retained as a surgeon and entered upon the cure. *Pippin v. Sheppard* . . . 746

— 3. **Unavoidable accident.**—If one does an injury by unavoidable accident, an action does not lie; *aliter*, if any blame attaches to him, though he be innocent of any intention to injure; as if he drive a horse too spirited, or pull the wrong rein, or use imperfect harness, and the horse taking fright kills another horse. *Wakeman v. Robinson* . . . 618

And see Solicitor and Client, 6.

NOTICE—Constructive. *See* Mortgage, 1.

NUISANCE—Navigable river—Encroachment on banks.—An encroachment on the banks of a navigable river is not necessarily a nuisance; but the jury ought, on the facts of the case, to say whether the public are in any way inconvenienced; for if they are not, then it is not a nuisance. *R. v. Shepard* . . . 559

OFFICE—Election to—Qualification. *See* Quo Warranto.

PARTITION—Mistake—Compensation.—Surveyors appointed to make a partition between tenants in common, having, by mistake, allotted to one of them a piece of land which belonged to him exclusively, and several of the allotments having been sold before the mistake was discovered, the Court decreed a pecuniary compensation to be made to him. *Dacre v. Gorges* . . . 246

PARTNERSHIP—1. **Action by continuing partner for goods sold before dissolution.**—Where a partnership between two persons in trade had been dissolved, and one of them carried on business afterwards, and was entitled to the profits: Held, that he might maintain assumpsit alone for goods sold and delivered to the defendant during the existence of the partnership. *Atkinson v. Laing* . . . 773

— 2. **Implied covenant to pay retiring partner's debts.**—By indenture between S. F., senior, of the first part, S. F., junior, of the second part, and J. H. H. on the third part, it was agreed that S. F., senior, should retire from business, and S. F., junior, and J. H. H. become partners; that the capital employed should be 36,000*l.*, 24,000*l.* of which S. F., senior, should advance for S. F., junior, and 12,000*l.* was to be advanced by J. H. H. The deed then proceeded, "And whereas an account of all the debts of S. F.,

senior, in his business of merchant, has been this day taken, and the balance in his favour amounts to 38,033*l.*, and whereas it has been agreed by and between S. F., senior, S. F., junior, and J. H. H., that the whole of the debts and credits of S. F., senior, shall be received and paid by S. F., junior, and J. H. H., and that the balance of 38,033*l.* shall be accounted for and paid by them in manner hereinafter mentioned; and S. F., senior, by indenture, hath assigned the debts and credits to them, this indenture further witnesseth that it is agreed, that in consideration of 12,000*l.* paid to S. F., senior, by J. H. H., and for raising 24,000*l.*, as S. F., junior's share of the capital, the sum of 36,000*l.*, part of the 38,033*l.* is to be retained by S. F., junior, and J. H. H., and the remaining 2,033*l.* paid to S. F., senior, by instalments, at six, twelve, eighteen and twenty-four months; and if any of the debts shall prove bad, the loss shall be borne by S. F., junior, and J. H. H.:" Held, that this deed amounted to a covenant by S. F., junior, and J. H. H. to pay the debts due from S. F., senior, in his business, at the date of the indenture. *Saltoun v. Houstoun* 665

PARTNERSHIP—3. Injunction against partner—Improper conduct of plaintiff.—Where a defendant in a suit, founded on charges of misconduct, for an account and a dissolution of the partnership and for an injunction to restrain him from receiving debts, drawing bills, &c. or further interfering in the partnership concern, denied or explained facts of appropriation to his own use of debts received by him from persons indebted to the concern, and alleged that he could not put in his answer to the bill because the plaintiff had possessed himself of the partnership books, and carried them away from the partnership premises, the Court refused to grant the injunction, on the ground of the plaintiff having acted improperly. *Littlewood v. Caldwell* 711

— 4. Indorsement of bill by managing partner.—One partner may act for the whole firm by procuration. *Williamson v. Johnson* . . 336

— 5. Deceased partner—Grant of administration to surviving partners. See *Executor and Administrator*, 3.

And see *Quo Warranto*.

PAYMENT—Appropriation of. See *Appropriation*.

PLEADING. See *Defamation*, 4—7; *Negligence*, 2.

POOR LAW—1. Overseer—Liability to serve office of—Qualification—"householder."—A., B., and C., carrying on trade in partnership, had a dwelling-house, yard, and premises, in a parish in London; all the partners were in the habit of frequenting the premises daily for the purpose of business, but none of them resided there. The dwelling-house was inhabited by a clerk, who managed the business for them, but the rent, rates, and taxes were paid by the firm: Held, that each of the partners was a householder within the 43 Eliz. c. 2, and liable to serve the office of overseer. *Rez v. Poynder* 345

— 2. Poor rate—Distress—Exemption—Servant of ambassador.—Where the servant of an ambassador did not reside in his master's house, but rented and lived in another, part of which he let in lodgings: Held, that his goods in that house, not being necessary for the convenience of the ambassador, were liable to be distrained for poor rates. *Novello v. Toogood* 507

— 3. — Gas company—Principle of assessment.—By an Act of Parliament the Birmingham Gas-light and Coke Co. had power given to them to supply the town of B. with gas, and to lay down pipes for the conveyance of gas from the manufactory to the houses of the consumers. Under this Act the company purchased lands and buildings, and there placed

retorts, &c. necessary for the manufacture of gas and coke, and fixed in the streets trunks, pipes, &c. for the conveyance of gas. The company derived a considerable profit from the manufacture and sale of coke and gas. The stock-in-trade and the profits of other manufactories in the pariah of B. were not rated to the poor: Held, that the company were not rateable to the amount of the profits of their trade, but for a sum equal in amount to that for which the premises would let to other persons willing to carry on the same business. *Rez v. Birmingham Gas-light and Coke Co.* . . . 483

POOR LAW—4. Poor rate—Pasture owned by corporation.—A corporation, consisting of a mayor, aldermen, and twenty-four capital burgesses, was seised in fee of certain pasture lands, and appointed a ranger to keep the keys of the gates, clean the ditches, preserve the fences, and impound cattle trespassing thereon; and, at a Court held annually, made regulations concerning their pastures, and the number of cattle each burgess was to turn on, and the sum to be paid in respect thereof, which money, after deducting the expenses of management of the land, was distributed among the burgesses who did not turn on: Held, that the corporation were liable to be rated to the poor, as the beneficial occupiers of these pastures. *Rez v. Mayor of Sudbury* . . . 423

— 5. — **River navigation—Tolls—River running through several parishes.**—The proprietors of an inland navigation are rateable to the relief of the poor in every parish through which the navigation passes, as occupiers of the land situate in each parish, used for the purpose of the navigation. The proprietors of a navigation which extended through different parishes, were rated in one parish for the entire amount of their tolls: Held, that the rate could not be supported. *Rez v. Palmer* . . . 502

— 6. — The proprietors of a navigation extending through several parishes are to be rated in an intermediate parish, not in respect of the riverage becoming due in that parish for goods landed there, but in respect of the profits of the land used for the navigation situate within the parish. *Rez v. Earl of Portmore* . . . 505

— 7. — **Timber—"Saleable underwood"—Trees not planted for profit—Liability to poor rate.** *R. v. Ferrybridge* . . . 411

PORTION—Satisfaction.—A father being tenant for life under his marriage settlement, with power to appoint the shares in which his younger children were to take a sum to be raised for their portions, having exercised the power by his will, afterwards made a provision for one of his daughters, took a release from her of her portion, and by a codicil revoked the appointment in his will, so far as it respected her: Held, that her share did not sink into the freehold, or belong to his residuary legatee, but that the other younger children were entitled to the whole fund. *Noel v. Lord Walsingham*

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And see Settlement (Marriage).

POSSESSION—Of goods, as evidence of title. *See Sale of Goods, 2.*

POWER—1. Remoteness.—Settlement on husband and wife for their lives, remainder to the sons in tail male, remainder to the daughters in tail, remainder to the survivor of the husband and wife in fee, with power to the wife, if the husband survived, and all the children of the marriage died without issue, to charge the estate with 5,000*l.*: Held, that the power is void for remoteness. *Bristow v. Boothby* . . . 248

— 2. Direction to settle with "usual" powers. *See Will, 18.*

— 3. Of leasing. *See Landlord and Tenant, 6, 10, 11, 13.*

— 4. Of sale. *See Executor and Administrator, 9; Will, 21.*

PRACTICE—1. **Costs—Taxation—Admission of clerk on.**—An attorney's clerk admitted, on the taxation of costs before the Master, that the suit in which the costs were taxed was conducted by his employer from motives of charity, on behalf of the plaintiff: Held, that the clerk was an agent so as to bind his master by the admission. *Ashbourne v. Price* . 787

— 2. — **Allowance to witness—Sailor remaining in country in order to give evidence.**—Where a seafaring man remained in this country in order to give evidence in a cause: Held, that on taxation of costs, the Master was justified in allowing him a subsistence from the service of the writ until the trial. *Berry v. Pratt* 396

— 3. — **Costs of mortgagee.**—Where a prior decree has ordered the costs of a defendant mortgagee to be taxed, he will be entitled to his costs, though it appears at the hearing on further directions that his debt was paid off before the commencement of the suit, and that he has set up an improper defence. *Wilson v. Metcalfe* 128

— 4. **Security for costs—Infant suing by next friend.**—An infant who sues by his next friend need not give security for costs, even though the next friend is sworn to be insolvent. *Yarworth v. Mitchel* . . . 555

[*And see cases on costs under Solicitor and Client.*]

— 5. **Joinder of parties.**—The Court cannot require several defendants to join in their defence.

If a motion is intended to lay the foundation for a subsequent application against the solicitor of some of the parties, the solicitor, in his personal capacity, ought to be made a party to that motion. *Van Sandau v. Moore* 100

— 6. **Production of documents.**—Possession of a steward of documents, as leases, &c., held to be the possession of his employer, and therefore not affected by a *subpoena duces tecum* served on the steward to produce them on the part of a defendant on the trial of an action at law, in which his employer was plaintiff. *Earl of Falmouth v. Moss* 753

— 7. — **Solicitor—Disclosure prejudicial to other clients.**—On an issue as to the liability of defendants as partners, an attorney subpoenaed to produce a composition deed, executed between the defendants and another firm who were clients of the witness, may object to the production of the instrument on the ground that its disclosure would prejudice his clients. *Harris v. Hill* 774

— 8. **Service of process.**—Process may be served at any hour. *Priddee v. Cooper* 601

— 9. **Separate answers by co-defendants.** See *Company*.

PRINCIPAL AND AGENT—1. **Agent's lien for general advances—Policy of insurance left with agent for safe custody.**—If a policy of insurance is left in the hands of an agent merely for safe custody, though he advances money to the assured without any other security than the policy, the agent acquires no general lien on the instrument for those advances; *sed aliter* if left with him as a security generally. *Muir v. Fleming* 775

— 2. **Purchase of goods by agent—Delay of principal in signifying dissent.**—A. consigned goods for sale to B., the captain of an Indian, bound on a voyage to Calcutta, and directed him to invest the proceeds in certain specified articles, or in bills at the exchange of the day. B. sold the goods at Calcutta, and invested the proceeds in sugar, which was not one of the articles specified in his instructions, and informed A. of the purchase by a letter, which the latter received on the 29th May. B. had no commercial establishment in this country, but by a memorandum on a promissory note given by him to A. before he sailed for India, it appeared that one

C. had acted as his agent in some insurance transactions. On the 7th August, A. notified to C. that he would not accept the sugars, and advised the latter to insure them. C. declined to interfere, alleging that he had no knowledge of any transactions between A. and B.: Held, upon these facts, in an action brought by A. to recover the proceeds of the goods shipped by him, that the jury were well warranted in finding that A. had assented to the purchase made by B. *Prince v. Clark* 352

And see Appropriation.

PRINCIPAL AND SURETY. *See Bond.*

PROMISSORY NOTE. — *See Bill of Exchange; Limitations, Statute of.*

PUBLIC-HOUSE—Sale of. *See Vendor and Purchaser, 4.*

PUBLIC OFFICER—Extortion by sheriff's officer.—The Court will interfere in a summary manner to punish a sheriff's officer for extortion, by directing him to pay back the money, and ordering him to be fined, and imprisoned until the money is paid. *Ex parte Radford* 557

QUO WARRANTO—Election to office—Qualification of electors—"Householder."—Where A., carrying on trade in partnership with others, had a dwelling-house, and counting-house attached to it in B., the counting-house being used by the different partners, who daily resorted thither for the purposes of their trade, and the dwelling-house being occupied by a clerk or servant of the firm, paid by them, as were also the rates, taxes, &c.: Held, that A. and each of his partners was a householder in B. within 26 Geo. III. c. 38, s. 8, although neither he nor they actually resided with their families in B.

So, also, where the dwelling-house was occupied by one of the partners rent-free, and the taxes, &c., were paid by the firm. *R. v. Hall* . . . 321

RATE. *See Poor Law, 2—7.*

RECEIVER. *See Tenant in Common.*

RELEASE—Of debt. *See Advancement.*

RIVER—Right to soil of bank of navigable river—Trespass.—An Act of 16 & 17 Car. II. authorised certain persons to make navigable the river Itchin, and other rivers, and to make new channels, and to deepen or widen the rivers, channels, &c. and to do all that might be fit for navigation, and to build locks, &c. upon any of the lands adjoining the rivers, &c. and to make towing-paths: and it was expressly provided that the undertakers of the navigation should not make any trench, river, or watercourse, or use the locks, &c. upon the land of any person until a full agreement with, and satisfaction to the owners of the land had been made by the commissioners appointed by the Act, or by the persons authorised to make the navigation, nor until satisfaction should be paid to the respective owners of the lands, according to the determination of the commissioners, or by agreement by the undertakers of the navigation. The commissioners were to determine what satisfaction any person should have for lands taken or damage sustained in case the undertakers of the navigation should not have agreed beforehand, and satisfied the party so damnified. The proprietor of the navigation having brought trespass against the owner of the adjoining land for cutting trees upon the bank of a channel made under this Act, the Judge at the trial admitted evidence of acts of ownership exercised by the proprietors of the navigation upon other parts of the banks where the adjoining land did not belong to the defendant, and afterwards left the question to the jury, upon conflicting acts of ownership which were given in evidence. The Judge said that it might be assumed from the length of time that had

elapsed since the passing of the Act, and from the provision that no land of any person was to be used until satisfaction was made to the owner, that some agreement had been made, by which all the land used for the purposes of the navigation had been sold to the proprietors by the land-owners. A rule having been obtained for a new trial, the Court

Held, first, that by virtue of the provisions of the Act, the proprietors of the navigation did not necessarily acquire such an interest in the soil in a bank adjoining to and formed out of the earth excavated from a new channel, made for the first time under the Act, as would enable them to maintain trespass.

Secondly, that as the purchase of the soil was not necessary for any of the purposes of the Act, it was to be inferred that no such purchase had actually been made; and that the improbability of any such purchase ought to have been presented to the jury.

Thirdly, that acts of ownership by the proprietor of the navigation upon different parts of the bank contiguous to new channels of the navigation made under the Act were not admissible in evidence to shew that the soil in the bank in question belonged to the proprietor of the navigation; and the rule for a new trial was made absolute. *Hollis v. Goldfinch* . . . 357

SALE OF GOODS—1. Fraud—Payment by worthless cheque—Intention to obtain goods without payment.—By a contract of sale, the property sold was to be paid for by ready money. The purchaser induced the servant of the vendor to deliver it for a cheque upon a banker, by representing it to be as good as money; in fact he had overdrawn his account for many months, and when the cheque was presented, payment was refused. On the same day that the goods were purchased, the purchaser gave a warrant of attorney to a creditor, under which judgment was immediately entered up, and execution issued, and the property in question seized by the bailiff of a liberty. While it was in his custody, the original owner rescued it: Held, in an action brought against the latter by the bailiff of the liberty for the rescue, that the question whether the contract of sale was so vitiated by fraud as to prevent the property in the goods passing to the purchaser, depended upon a question of fact, which ought to have been submitted to the jury, viz., whether the purchaser had obtained possession of the goods with a *preconceived* design not to pay for them. *Earl of Bristol v. Wilemore* . . . 488

— 2. Proof of seller's title to goods.—Where a plaintiff in an action for goods sold and delivered, proved the possession of the goods by himself, and their removal by the defendants; and it appeared that the goods consisted of spar lying on the lands of A., and that the plaintiff claimed under A. by a written agreement not produced: Held, that this was not sufficient proof of title to the goods, from which a contract between the parties could be implied. *Lee v. Shore* . . . 317

— 3. Statute of Frauds—Two distinct letters referring to contract.—The purchaser of 100 sacks of good English seconds flour, at 45s. a sack, wrote to the vendors as follows: "I hereby give you notice, that the corn you delivered to me in part performance of my contract with you for 100 sacks of good English seconds flour, at 45s. per sack, is of so bad a quality that I cannot sell it, or make into saleable bread. The sacks of flour are at my shop, and you will send for them, otherwise I shall commence an action." To which the vendors answered by their attorney, "Messrs. L. & L. consider they have performed their contract with you as far as it has gone, and are ready to complete the remainder; and unless the flour is paid for at the expiration of one month, proceedings will be taken for the amount":

Held, that a jury was warranted in concluding that the contract mentioned in the vendors' answer, was the same as that particularised in the purchaser's letter, and that, therefore, the two writings constituted a sufficient memorandum of the contract under the statute. *Jackson v. Lowe* . . . 567

SALE OF GOODS—4. Stoppage in transitu—Delivery.—A. delivered a quantity of iron to a carrier to be conveyed by the latter to B., the buyer in the country. The carrier having reached B.'s premises, landed a part of the iron on his wharf, and then finding that B. had stopped payment, reloaded the same on board his barge, and took the whole of the iron to his own premises: Held, that there was no delivery of any part of the iron so as to divest the consignor of his right to stop *in transitu*. *Crawshay v. Eades* 348

And see **Bill of Exchange, 3.**

SCHOOL—Ejectionment of schoolmaster after dismissal.—Held, that the visitors and feoffees of a school who had dismissed the schoolmaster for misconduct, could not maintain ejectionment for the schoolhouse till they had determined the master's interest in a regular way, by summoning him to appear before them. *Doe d. Earl Thanet v. Gartham* 649

SEA-WALL—Obligation to repair—Contribution—Mandamus.—In the absence of a usage to the contrary, all those who enjoy the benefit of a sea-wall are bound to repair and maintain it. But, by evidence of usage, the obligation may be shown to lie upon individuals. Even in that case, if the individual is not in default, the damage done by extraordinary tempest must be borne by the general body of proprietors. But the Court will not, at the instance of an individual who is in default in making the repairs which he is bound to make, grant a *mandamus* calling upon the other owners to contribute, on the suggestion that the repairs have become necessary by reason of an extraordinary tide and tempest. *R. v. The Commissioners of Sewers for Essex* 467

SETTLEMENT (MARRIAGE)—Younger son—Right to portion on becoming eldest.—A son, who, when he attained twenty-one, was a younger child, but, by the subsequent death of his elder brother, in the lifetime of his parents, becomes an eldest son before the time fixed for the payment of the younger children's portions, is entitled to his share of portions, which are directed to vest in younger sons at twenty-one, though not payable till after the death of the parents; there being enough in the settlements, by which the portions were provided, to shew that the character of younger child was to be ascertained by reference to the time when the portions vested, and not to the time when they became payable. *Windham v. Graham* 62

And see **Husband and Wife; Portion.**

SHERIFF—Extortion by officer. See Public Officer.

SHIP—Implied authority of master to order repairs.—The relation between the owner and commander of a vessel, as to the ordering and payment of necessaries and repairs, is exactly the same as between a master and servant generally; and, consequently, the presumption of an implied authority of the commander to order repairs to be done on the credit of the owner may be repudiated by circumstances, as where the commander promises to pay ready cash, and no mention is made of the owner's responsibility. *Gordon v. Hare* 561

SOLICITOR AND CLIENT—1. Answer to affidavit charging indictable offence.—The Court will not call upon an attorney summarily to answer the matters of an affidavit, charging him with an indictable offence, but will leave the parties complaining to their prosecution for the offence. *Short v. Pratt* 602

— 2. **Costs—Personal undertaking of solicitors to withdraw**

action—Implied promise to pay costs.—Where the attorneys for 1 plaintiff and defendant, in a cause which was ready for trial, entered into agreement whereby they *personally* undertook that the record should be withdrawn, that certain things should be done by the plaintiff and defendant, and that costs should be taxed for the defendant in a certain manner: Held, that the attorney for the plaintiff was personally bound to pay the costs when taxed in the mode specified. *Iveson v. Conington* . . . 3

SOLICITOR AND CLIENT—3. Costs—Action commenced on instructions.—A bill filed by a solicitor on instructions furnished by the brother-in-law of the plaintiff, without any communication with the plaintiff himself, being dismissed with costs, the solicitor was ordered to pay the costs, it appearing that the plaintiff had absconded before the bill was filed. *Hall v. Bennett* 16

— 4. — **Action not personally conducted by solicitor.**—A solicitor cannot recover a charge for conducting a suit in which the party charged has not had the benefit of the solicitor's judgment and superintendence. *Hopkinson v. Smith* 57

— 5. — **Set-off by client for debt of larger amount—Retained by agent for general agency charges.**—Held, that where the plaintiff's solicitor was indebted to the plaintiff in a sum greater than the solicitor's costs in the cause, the agent (to whom the plaintiff's solicitor was indebted on a general account in a sum greater than the amount of the solicitor's costs) could not, as against the plaintiff, retain out of the sum recovered by the plaintiff more than the charge for agency in that particular cause. *White v. Royal Exchange Assurance* 574

— 6. **Negligence—Investigation of title.**—The executrix of an attorney is liable in case for the negligence of her testator, in not making due inquiry into the validity of a security upon which his client proposes to advance money. The duty of an attorney is not so strict, but that if he is lulled by the assurance of his client into a persuasion that the security is good, so as to abate his vigilance in the inquiry into its validity, his liability for negligence is discharged. *Wilson v. Tucker* 777

— 7. **Omission to take out certificate no bar to remedy for libel on professional character.**—It is no objection to maintaining an action for libel, that during the time of the grievances stated in the declaration, the plaintiff had omitted to take out his certificate as required by statute for more than a year; but that he might still sue as an attorney for damages in consequence of a libel imputing improper conduct to him in his character of attorney. *Jones v. Stevens* 714

— 8. — **Production of document prejudicial to interests of other clients.** See Practice, 7.

And see Practice.

SPECIFIC PERFORMANCE. See Vendor and Purchaser.

TENANT FOR LIFE—Discharge of mortgage by. See Mortgage, 2.

And see Waste.

TENANT IN COMMON—Receiver.—Motion for a receiver by one tenant in common against his co-tenant, on the ground that the latter had given notice to the tenants to pay their rents to him only, and had advertised the estate for sale, refused, because the conduct complained of did not amount to an exclusion. *Tyson v. Fairclough* 175

TIMBER—"Saleable underwoods."—Firs and larches planted with oaks for the purpose of sheltering the latter, and cut from time to time, as

the oaks grew larger and required more space, but when once cut, not growing again, and some of them yielding a profit by sale, are not "saleable underwoods" within the 43 Eliz. (now 37 & 38 Vict. c. 54). *Semble*, that they are not underwood at all. *R. v. The Inhabitants of Ferrybridge*. 411

TIME—Where of the essence of the contract. *See Vendor and Purchaser*, 4.

TOLL. *See Market*.

TRESPASS. *See Landlord and Tenant*, 12; *River*.

TRUSTEE—1. Breach of trust—Beneficiary dealing (in ignorance) solely with agent of trustee.—The trustee of a legacy, which had been invested in stock, authorises the sale of the stock, and permits B. to receive the proceeds; B. retains the money in his hands; and during many years the legatee, who was not aware that the legacy had ever been invested in stock, or that stock in which it once was invested had been sold, deals with B. as the only person accountable to her for the money; notwithstanding these dealings on the part of the legatee, the trustee continues to be accountable for the stock. The legatee's ignorance of the facts precludes the trustee from alleging that the breach of trust had been condoned by acquiescence. *Adams v. Clifton* 53

— 2. — Employment of trust money in business—Interest. *See Executor and Administrator*, 10, 11.

— 3. Breach of trust by co-estate—Laches.—Where the estate of a trustee is secondarily liable in consequence of a breach of trust by a co-trustee, the *cestui que trust* is bound to pursue his demand against the former estate with due diligence. *Newham v. Newham* 272

— 4. Declaration of trust executed after act of bankruptcy.—A lease was granted to W., who afterwards committed an act of bankruptcy, and then executed a declaration of trust in favour of R. On the trial of an issue directed by the Court, it was found that W.'s name was used in trust for R.: Held, that the lease did not pass to W.'s assignees. *Gardner v. Rowe* 214

— 5. Discretionary power—Duty of intending trustee to disclose circumstances tending to bias.—A person, before he accepts a trusteeship, to which a discretionary power is annexed, is bound to disclose any circumstances in his situation, which give him a bias or an interest against the due exercise of that discretionary power.

If he accepts the trusteeship, without disclosing such circumstances in his situation, he cannot afterwards exercise the discretionary authority for his own benefit. *Pryton v. Robinson* 278

— 6. Cost of collecting rents of weekly property.—A testator gave annuities to his trustees for their trouble in the execution of the trusts of his will. The trust property comprised several houses, let at weekly rents. The trustees are justified in paying a person to collect these rents, and do not, on that account, lose their annuities. *Wilkinson v. Wilkinson* 193

— 7. Declaration of trust—Bequest to uses declared by separate and informal document. *See Will*, 30.

And see Charitable Trust.

VENDOR AND PURCHASER—1. Auctioneer—Return of deposit—Interpleader.—If an action is brought against an auctioneer for a deposit, he cannot file a bill of interpleader, if he insists upon retaining either his commission or the duty. *Mitchell v. Hayne* 151

VENDOR AND PURCHASER—2. Interest on unpaid purchase-money.—A purchaser will be charged with interest on his purchase-money, only from the time when, with reasonable diligence on his part, the conveyance might have been completed.

Though a purchaser has the benefit of the increased value of ornamental timber, by reason of its growth during the years that have intervened between his agreement, and the time from which he is considered as in possession of the land, he will not in respect of that benefit be charged with interest on any part of the purchase-money. *Boehm v. Wood* . . . 280

— 3. **Purchaser in possession—Interest on purchase-money.**—Where the purchaser, upon entering into possession, paid the amount of his purchase-money to his banker, and gave notice that he was ready to invest it in such manner as the vendor should require; but no answer was returned to that notice, and the purchaser, during the investigation of the title, kept in the hands of his banker a balance equal to the amount of the purchase-money, except for four days, when it was a little less: the Court held the purchaser not liable for interest on the difference between his average balance during the period in question and during the three preceding years. *Winter v. Blades* . . . 236

— 4. **Sale of public-house—Time of essence of contract.**—In an agreement by a tenant at will of a public-house for the sale of the possession, trade, and goodwill of the house at a fixed sum, and of the stock and furniture at a valuation, one of the terms being that possession should be taken, and the money paid on a given day, time is of the essence of the contract; and a purchaser, who was not in a condition to fulfil his part of the contract until the following day, cannot compel a specific performance. *Coslake v. Till* . . . 75

— 5. **Title—Action pending which impugns vendor's title.**—On a reference of title in a suit by a vendor for the specific performance of a contract for the purchase of lands, the mere fact that a suit has been subsequently instituted and is pending, in which part of the lands are claimed adversely to the vendor, is not a sufficient ground for reporting that a good title cannot be made. *Osbaldeston v. Askeu* . . . 21

— 6. — **Adverse claim—Implied notice of settlement.**—A plea of purchase for valuable consideration, without notice, is no protection against an adverse claim which the purchaser might have had notice of, by using due diligence in investigating the title. *Jackson v. Rowe* . . . 250

— 7. — **Title not completed before commencement of suit.**—It being necessary, in order to make a title perfect, that a recovery should be suffered for the purpose of barring an old estate tail vested in a person who was not a trustee for the vendor, the deed making the tenant to the *præcipe* and the warrant for suffering the recovery were executed before the filing of the bill for specific performance, but the recovery was not completed till a few days afterwards: Held, that a good title was not shewn before the commencement of the suit. *Lewin v. Guest* . . . 58

— 8. — **Covenant for further assurance—Production of deeds.**—If a vendor retains the title deeds, and covenants for further assurance only, the purchaser may, under that covenant, compel him to produce the deeds and (probably) also to execute a covenant for their future production. *Fain v. Ayers* . . . 264

— 9. — **Equitable title of purchaser in possession as against tenant for life.**—A remainderman sells property, representing himself to have the concurrence of the tenant for life. The purchaser having been let into possession, pays off a charge to which the owners of the property are liable *ratione tenuræ*. He was held to have a lien on the property so far that he could not be turned out by the tenant for life pending a suit for specific

performance of the agreement, to which the tenant for life is made a defendant. *Ludlow v. Grayall* 703

VENDOR AND PURCHASER—10. Title—Purchase of two lots—Good title shewn to one lot only.—A person, who purchases two lots, is not justified in refusing to perform his contract for the purchase of the second lot, because a good title is not shewn to the first lot. *Lewin v. Guest* 58

— 11. — Reference of title.—In a suit by a vendor for specific performance, the decree at the original hearing having directed merely a reference of title, the Court will not, at the hearing on further directions, enter into the consideration of any other objection which the answer had set up against the execution of the contract. *Le Grand v. Whitehead* . . . 56

— 12. — Sale under decree—Costs.—A purchaser under a decree is entitled to his costs where the Master reports against the title, although there is no fund in Court. *Smith v. Nelson* 266

WARRANTY—Of horse. See Horse.

WASTE—Tenant for life and remainderman.—The reversioner of leaseholds, with the privity of the tenant for life, renewed the lease in his own name, and covenanted to repair the premises: Held, that he was to be considered as having entered into the covenant on behalf of the tenant for life, and that the latter's estate was liable for dilapidations occasioned by his neglecting to repair. *Marsh v. Wells* 160

WILL—1. Abatement—Legacy to wife in lieu of dower.—A testator having by a post-nuptial settlement made certain provisions for his wife, which were expressed to be in bar of dower, bequeaths to her specific legacies, and a sum of money, adding that what he has so given her, together with the provision made for her by the settlement, shall be in lieu of any dower which she might claim; the assets having proved insufficient for the payment of the legacies in full: Held, that the wife is entitled to priority over the other legatees, and that the legacy given to her ought not to abate proportionally with the other legacies. *Heath v. Dendy* 135

— 2. Annuity—Diminution of income through conversion of stock—Right of annuitant to receive deficiency out of capital.—A testator having directed his executors to lay out in what Government security they pleased, as much money as would produce a certain annual interest, and having given that annual interest to his wife during her life, in case she did not marry again, the executors invested in the 5 per cents. a sum which yielded dividends exactly equal to the specified income; those dividends being afterwards diminished by the conversion of the 5 per cents. into 4 per cents., the widow was held entitled to have the deficiency made good, either by the sale from time to time of portions of the appropriated stock, or out of any other part of the residue which could be made available. *May v. Bennett* 72

— 3. — Whether primarily payable out of real or personal estate.—A testator by his will directs that, with the money arising from the personal estate bequeathed to his trustees (which is to be first so applied), and from the sale or mortgage of certain real estates devised to the same trustees for a term of years, the annuities and legacies thereafter given are to be paid; and he gives, among other things, an annuity secured by powers of distress and entry on the real estates: by a codicil he bequeaths his personalty and the residue of his real estates for a term of years to other trustees upon the trusts in his will and codicils mentioned: and he then gives to A. M. an annuity which he charges on the residue of his real estate,

and secures by a power of distress: Held, that the personalty is the primary fund for the payment of A. M.'s annuity, and that the real estate is charged only as an auxiliary fund. *Fitzgerald v. Field* 97

WILL—1. Bequest to "nephews and nieces or their respective child or children"—Absolute gift or life interest.—A testator bequeaths a sum of stock to each of five nephews and nieces, or to their respective child or children; should any die without child, the share to revert to the residuary legatee. Each of the nephews and nieces who survives the testator takes his or her legacy of stock absolutely.

The same testator appoints as his residuary legatee E. P. M., his child or children; in case of his death without any such, the residuary interest to vest in the other five nephews and nieces then alive, share and share alike, and, as before, to each of their respective child and children; and in case of either of their deaths without any issue, then his or her share to be divided amongst the survivors. E. P. M., having survived the testator, takes the residue absolutely. *Montagu v. Nucella* 25

— 5. **Charge of debts.**—Where real estate is devised subject to debts and legacies, and the devisee is also executor, a purchaser or mortgagee from him of the real estate is liable to the charge, if the circumstances of the transaction afford intrinsic evidence that the mortgage or purchase-money was not to be applied to the payment of the debts or legacies. *Watkins v. Cheek* 181

— 6. **Charitable bequest.**—A bequest "to the widows and orphans of the parish of L." held a good charitable bequest. *Att.-Gen. v. Comber* . 163

— 7. **Charitable trust—Blanks in will—General intention.**—Where a testator gives a sum of stock to trustees, and shews a clear intention to dispose of the whole of the dividends for the benefit of charitable institutions, and does, in fact, specify some of them, and the yearly sums to be paid to them, but leaves blanks for the names of others and for the sums to be paid to them; the Court will refer it to the Master to approve of a scheme for the application of the remaining dividends. *Pieschel v. Paris* 230

— 8. **Condition—Direction to "take care and provide for A."**—**Gift of residue "subject as aforesaid."**—A testator having bequeathed various legacies, and, among others, an annuity of 5*l.* to his daughter during her life, directs his son (whom he afterwards makes his executor) to take care of and provide for her; and "subject as aforesaid," he gave to that son the residue of his real and personal estate: Held, that the daughter is entitled to a provision out of the residue, in addition to her annuity; and a reference was directed to the Master, to fix the amount of such provision. *Broad v. Bevan* 123

— 9. — **Time of performance.**—G., having by deed given his niece a life interest in some real property, by his will devises to her other real property in fee, and then directs the debts due to him from her husband to be released, on condition that, within two months from his (the testator's) decease, the husband shall release all claim in or to the property which the testator had given or should give to the wife: Held, that the release, which the husband is to execute, is to be in favour of his wife, and not for the benefit of the estate: That the husband does not forfeit the benefit intended for him by not executing, within the time limited by the will, such an instrument as the testator required of him. *Hollinrake v. Lister* . 117

— 10. **Condition in restraint of marriage.**—A bequest to M. on the day of her marriage with any other person than T., and if she married T. then over. M. married T. in the lifetime, and with the consent of the testator: Held, that she was entitled to her legacy. *Smith v. Cowdery* 221

— 11. **Contingency—Gift over.**—A testator bequeathed a sum of stock to trustees, upon trust to pay the interest to his son during life, with a direction if he married a woman with a fortune of a specified amount, to

settle the fund upon her and the issue of the marriage; but in case of the son's decease, leaving no issue of his body, the stock was given over to various persons; and the testator also disposed of the residue of his estate. The son married a woman who had not the fortune required by the will, and died leaving issue of that marriage: Held, that the son's life interest in the stock was not extended, by implication, to a *quasi* estate tail; That the issue of his marriage took no interest in the stock; That the gifts over failed; And that, after the son's death, the stock belonged to the residuary legatee. *Andree v. Ward* 36

WILL—12. Contingent legacy—Interest.—Legacy to A. as soon as she attains twenty-one, with interest, is contingent, and no interest is payable until the legatee attains twenty-one, and then is to be computed from the end of a year after the testator's death. *Knight v. Knight* . . . 253

— **13. Demonstrative legacy.**—A pecuniary legacy, directed to be paid by the sale of an estate, which the testator had contracted to purchase, is a demonstrative legacy, and if the contract cannot be completed, the legacy is payable out of the testator's general assets. *Fowler v. Willoughby* 219

— **14. Devise of mansion-house with "All the lands thereunto belonging."**—A. being the owner of an estate called D., with a mansion-house upon it, in which he resided, purchased an adjoining estate, and occupied a part of it himself, together with the D. estate, having removed some of the fences by which they had been separated; and afterwards devised to his widow for life "all and singular his mansion-house in which he then lived called D., together with all buildings and lands thereunto belonging, as then enjoyed by him; and after her decease, all his said mansion-house called D., with the lands thereunto belonging, with the appurtenances, to his godson J. S. B., his heirs and assigns for ever:" Held, that the widow took an estate for life in that part of the newly-purchased estate which the testator occupied himself, as well as in the old D. estate; and that J. S. B. took a remainder in fee in all that was given to the widow for life. *Bodenham v. Pritchard* 405

— **15. Devise of copyholds to trustees—"To be transferred" to beneficiary at twenty-one—Estate of trustees.**—A testator devised to trustees, in trust for his only son, all his freehold and copyhold lands, to be transferred to him as soon as he should attain to twenty-one years of age; and in case he should die before he attained to the age of twenty-one years, then to A. B., his heirs and assigns: Held, that the trustees took in the copyhold lands an estate for years, determinable on the son's attaining the age of twenty-one years, or by his death before that period. *Doe d. Player v. Nicholls* 398

— **16. Devise of reversion.**—Lands were settled on the first and other sons of a marriage successively in tail male; remainder to the daughters of the marriage as tenants in common in tail general, with cross remainders between them, and the ultimate reversion in fee was limited to the husband, who afterwards, by a will reciting that he was seised of the reversion in fee-simple, expectant upon the contingency of there being no child of the marriage, or of the death of all the children of the marriage without issue, devised his reversion in case he should die without any child or children, or, there being such, all of them should die without issue: Held, that the devise of the reversion was void. *Bankes v. Holme* . . . 79

— **17. Devise to British Museum—Mortmain.**—A devise to the British Museum is within the Statute of Mortmain; and so is every devise for a public purpose, whether local or general. *The Trustees of the British Museum v. White* 270

— **18. Direction to settle with usual powers—Power to appoint portions.**—A will directed a settlement to be made of real estate on A. and

his first and other sons in tail, with powers of jointuring, leasing, sale and exchange, and all other clauses, powers and provisos usually inserted in settlements of the same kind: Held, that these last words did not authorize the insertion of a power to charge with portions. *Higginson v. Barney* 256

WILL—19. Election.—A testator bequeathed to his wife during her life four sevenths of the income of his general residuary estate, in which he intended to include a Scotch heritable bond; but the infant heir having elected, under the order of the Court, to claim against the will, took that bond by his legal title, subject to the widow's right of terce: Held, that the widow must elect, and that, although disappointed of the four sevenths of the interest of the bond debt, which the testator meant her to enjoy, she must, if she claimed what he had effectually bequeathed to her, bring in her terce to increase the general residuary estate. *Reynolds v. Torin* . . . 13

— 20. "Failure of issue"—Remoteness.—A testatrix devises to A. for life, remainder to A.'s first and other sons in tail male, remainder to A.'s daughters as tenants in common in tail, with cross remainders between them in tail; remainder to trustees for a term of years upon trust, to raise and pay such legacies as she had thereafter given, or should give by any codicil; and, in a subsequent part of the will, she bequeaths various legacies from and immediately after the decease and failure of issue of A: Held, that, "failure of issue" in the gift of the legacies must be considered "failure of such issue, as were included in the limitation of the estate," and that, therefore, the bequests were not too remote. *Morse v. Lord Ormonde* . . . 85

— 21. General direction to sell—Implied power to executors.—A testator directed his real and personal property to be sold and divided amongst his sisters. A power to the executor to sell the real property is implied. *Tylden v. Hyde* . . . 194

— 22. Gift over—Change of "or" into "and."—Devise to A. when he should attain twenty-one, for life; and after his decease to the first son of the body of A. lawfully begotten, and his heirs male; like remainders to the second and other sons in succession; like remainder to the daughter or daughters. Like devise to B., brother of A., with like remainders to B.'s issue. Like devises to C. and D., other brothers of A., with like remainders to their respective issues. And in case either or any of them, (A., B., C., and D.,) should die before the age of twenty-one years, or without leaving any child or children, then that the several estates devised to him or them should go to the survivor or survivors, share and share alike, under the same limitations as before described.

A. having attained twenty-one, and being a bachelor and unmarried, made a feoffment, and levied a fine with proclamations of the property devised to him, to his own use in fee, and to the intent to destroy contingent uses and estates limited to his sons and daughters:

Held, that by so doing, he acquired an absolute estate of inheritance in the property. *Hasker v. Sutton* . . . 695

— 23. Legacy duty—Will proved and estate situate wholly in India—Remittance to English legatee.—Where a testator dies in India, leaving personal estate there only, and his executors reside and prove his will there, no duty is payable on a legacy remitted to a legatee in England. *Logan v. Fairlie* . . . 208

— 24. Limitations—Remoteness.—A testator bequeathed personal property to his trustees and executors, upon trust, to pay the dividends to his daughter during her life, to her separate use, and, after her decease, to pay the principal unto all and every her children who should live to attain twenty-three years of age, share and share alike, with benefit of survivorship, in case any of them died under that age; with limitations over, in case there should be no such child or children, or, being such, all of them should die

under twenty-three, without lawful issue. The daughter had a child, who died under age in the daughter's lifetime. The bequests to the children, and the subsequent limitations, were too remote. *Bull v. Pritchard* . . . 27

WILL—25. Mistake—Direction that residue be “divided into eight equal shares”—Bequest of seven shares only.—A testator directs the residue of his property to be divided into eight equal shares: and disposed of “as follows among the children of A. B. :” he then gives two shares to each of the two daughters, and one share to each of the three sons of A. B., making together only seven shares: Held, that the whole residue is divisible amongst the children of A. B. in seven parts: each daughter taking two of those seventh parts, and each son one. *Berkeley v. Palling* . . . 115

— 26. “**Next-of-kin.**”—Bequest to the testatrix's daughter for life, and after her death as she should appoint, and, in default of appointment, to the testatrix's next-of-kin, to be considered as a vested interest from the testatrix's death, except as to any child afterwards born of her daughter. The daughter having died without having had any child, and without executing any appointment: Held, that the persons who would be next-of-kin at the testatrix's death, if her daughter had been then dead without children, were entitled. *Bird v. Wood* . . . 238

— 27. **Revocation.**—By a settlement made on the marriage of A. and B., the intended wife B., in exercise of a general power of appointment vested in her by a previous deed of the 4th of May, 1799, appointed certain freehold houses to the use of trustees, during the joint lives of herself and her husband, for her separate use, with remainder in the event of her dying in the lifetime of her husband (which happened) as she should appoint by will, attested by three witnesses, with limitations over. Shortly after her marriage, B., by will duly attested by three witnesses, devised the houses to her husband in fee; afterwards, in 1811, she and her husband executed a deed, attested by two witnesses, by which, after reciting the indenture of the 4th of May, 1799, but not mentioning the marriage settlement, B., in exercise of the power given her by the deed of 1799, and of all other powers, &c., appointed the messuages to the use of her husband for life, remainder to the use of herself for life, remainder to the use of the children of the marriage as she should appoint, and, in default of appointment, to all the children equally in tail, with remainder to her husband in fee: Held, that the deed of 1811 did not operate as a revocation of the previous will. *Eilbeck v. Wood* . . . 139

— 28. **Survivorship.**—Legacy of 600*l.* to F., and at her death to her two daughters in equal shares, and at their death to their children. One of the daughters having died without children: Held, that the children of the other daughter did not take the whole 600*l.*, but only their mother's share. *Taniere v. Pearkes* . . . 229

— 29. **Second will containing similar provisions to first.**—Held, that a second will was made, if not wholly, yet, as to the greater part, in substitution of the first, from the similarity of the form and expressions of the two instruments, and of the annuities and legacies, and from the gifts of two estates specifically devised. *Hemming v. Gurrey* . . . 209

— 30. **Trust declared by separate and informal document.**—A testator bequeathed a legacy to A. and B. in trust for certain purposes, which the will stated to have been fully explained to them. A paper writing was signed by A. and B., in which they declared that the bequest was upon trust for six persons, whose names were stated: and, after their signatures, some lines were added in the handwriting of the testator, by which a seventh person (an unborn child) was admitted to a share of the legacy. Upon a bill, filed by one of the six persons named in the document, the

Court recognized the document as a valid declaration of trust, though it had not been proved as a testamentary paper. *Smith v. Attersoll* . . . 41

WILL—31. Uncertainty as to purpose.—A testator bequeaths to "his only son 60*l.* per year for ever: also to provide for the two daughters of H. E. and the remainder of his property to the two children of S. A.:" Held, that, under these words, the two daughters of H. E. do not take any benefit. *Abraham v. Alman* . . . 125

— 32. "**Utensils in and about mansion-house**" — **Farming utensils.**—A testator directs that his household furniture, &c. and utensils in and about his mansion-house at H. should go with the mansion-house, and that, for that purpose, his trustees should make an inventory of the furniture, &c., and utensils which should be found in and about his mansion-house and premises at the time of his decease. These words do not pass farming utensils on lands at H., occupied by the testator along with the mansion-house. *Fitzgerald v. Field* . . . 97

— 33. **Vesting of legacy.**—A legacy was charged upon real estate, to vest immediately on the testator's death, but to be paid to the legatee on attaining twenty-one, and the interest to be applied in the meantime for maintenance, the legatee having died before attaining twenty-one: Held, that the express direction that the legacy should vest on the death of the testator, prevents its sinking for the benefit of the devisee, and that the personal representative of the legatee was entitled to the legacy. *Watkins v. Cheek* . . . 181

— 34. — A gift of residue to two persons equally, to be held in trust until they come of age or marry, and if either dies unmarried or under age, to the survivor; but if both die leaving no issue, then as therein mentioned: Held, that the gift vested indefeasibly at twenty-one or marriage. *Thackeray v. Hampson* . . . 186

— 35. — **Gift to children who die under twenty-one.**—A testator bequeathed a fund, which was to be produced by the conversion into money of the residue of his real and personal estate, to trustees, upon trust to pay the interest of one moiety to his daughter, for her separate use during her life; and, after her death, to pay 100*l.* a year to her husband during his life; and to apply the remainder of the dividends to the maintenance and education of all and every her children, until they attained twenty-one respectively, and when they attained their respective ages of twenty-one, upon trust to pay the principal to them in equal shares: the mother survived the testator, and left two children, who died under twenty-one. The moiety of the residue vested in these children. *Jones v. Muckilvain* . . . 32

— 36. "**Whatever else I may then be possessed of at my decease**" — **Whether passing residue.**—A bequest of "my furniture, plate, books, and live stock, or what else I may then be possessed of at my decease," will pass the general residuary estate, though followed by specific bequests and devises to the same person, and by gifts of pecuniary legacies to various other persons. *Fleming v. Burrows* . . . 48

— 37. **Gift of stock to charity.** See **Charitable Trust**, 5.

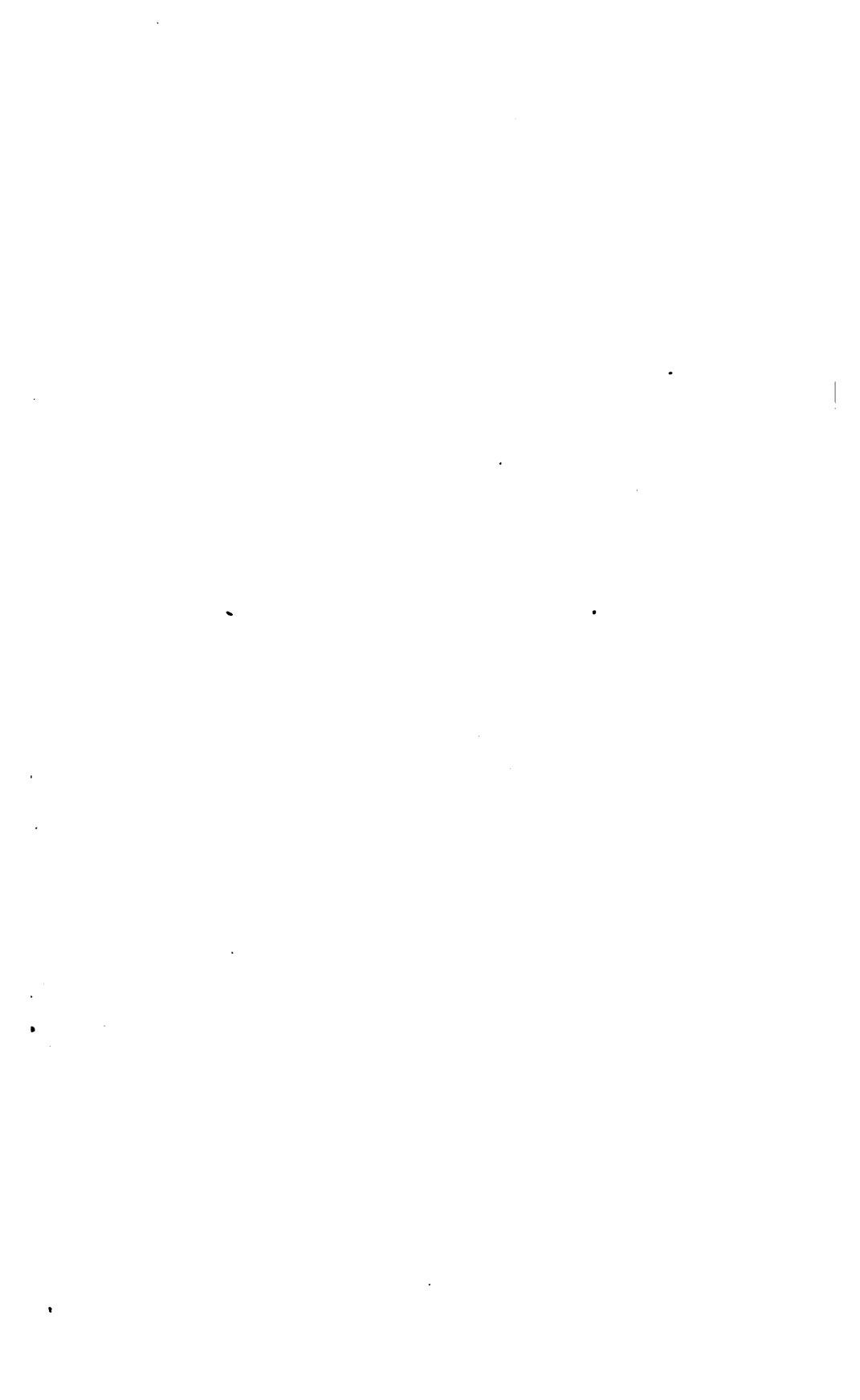
— 38. **Power to executors to sell.** See **Executor and Administrator**, 9.

WITNESS—Allowance to. See **Practice**, 2.

WORDS—"Failure of issue." See **Will**, 20.

— "**Fence.**" See **Common**.

— "**Householder.**" See **Poor Law**, 1; **Quo warranto**.



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